

ATTACHMENT A

Highly Confidential - Attorneys' Eyes Only

Page 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF WASHINGTON
3 AT SEATTLE
4

5 MICROSOFT CORPORATION, a
6 Washington corporation,
7 Plaintiff,

8 vs. No. C10-1823-JLR

9 MOTOROLA, INC. MOTOROLA
10 MOBILITY, INC., and GENERAL
11 INSTRUMENT CORPORATION,
12 Defendants.
13

14 REVISED

15 DEPOSITION OF HORACIO E. GUTIERREZ

16 Taken on behalf of the Defendants

17 April 4, 2012

18 BE IT REMEMBERED THAT, pursuant to the Washington Rules of
19 Civil Procedure, the deposition of HORACIO E. GUTIERREZ, was
20 taken before Tia B. Reidt, #2798, a Certified Shorthand
21 Reporter, and a Notary Public for the State of Washington,
22 on April 4, 2012, commencing at the hour of 9:08 a.m., the
23 proceedings being reported at 315 5th Avenue South,
24 Suite 1000, Seattle, Washington.

25 Job Number: 48313

Highly Confidential - Attorneys' Eyes Only

Page 2

1 APPEARANCES

2
3 Appearing on behalf of the Plaintiff

4 DAVID T. PRITIKIN

5 SIDLEY AUSTIN

6 One South Dearborn

7 Chicago, IL 60603

8
9
10
11
12 Appearing on behalf of the Defendant

13 PAUL M. SCHOENHARD

14 ROPES & GRAY

15 One Metro Center

16 700 12th Street NW

17 Washington, DC 20005

Highly Confidential - Attorneys' Eyes Only

Page 3

1 APPEARANCES CONTINUED

2
3 Appearing on behalf of the Defendant

4 RALPH H. PALUMBO

5 SUMMIT LAW GROUP

6 315 Fifth Avenue South

7 Seattle, WA 98104

8
9
10
11
12 ALSO PRESENT:

13
14 Michael Carter,

15 Videographer
16
17
18
19
20
21
22
23
24
25

Highly Confidential - Attorneys' Eyes Only

Page 4

1 EXAMINATION INDEX

2

3	EXAMINATION BY	PAGE
4	Mr. Schoenhard	6

5

6 EXHIBIT INDEX

7

8	EXHIBIT NO.	DESCRIPTION	PAGE
---	-------------	-------------	------

9	EXHIBIT 1	24-page confidential patent	83
10		license agreement.	

11	EXHIBIT 2	18-page confidential patent	88
12		license agreement.	

13	EXHIBIT 3	18-page confidential patent	91
14		license agreement.	

15	EXHIBIT 4	12-page confidential patent	95
16		covenant agreement.	

17	EXHIBIT 5	25-page settlement, release,	97
18		and license agreement.	

19	EXHIBIT 6	16-page WiLAN Microsoft document	101
20		dated 8/17/06.	

21

22

23

24

25

Highly Confidential - Attorneys' Eyes Only

Page 5

1 HORACIO E. GUTIERREZ

2 DEPOSITION OF HORACIO E. GUTIERREZ

3 Wednesday, April 4, 2012

4 9:08 a.m.

5
6 THE VIDEOGRAPHER: This is the start of tape
7 labeled No. 1 of the video deposition of Horacio Gutierrez
8 in the matter of Microsoft versus Motorola in the District
9 Court, Western District of Washington at Seattle, Case
10 No. C10-1823-JLR. This deposition is being held at the
11 Summit Law Group, 315 5th Avenue South, Seattle, Washington,
12 on April 4th, 2012, at approximately 9:09 a.m.

13 My name is Michael B. Carter from TSG Reporting,
14 Inc., and I'm the legal video specialist. The court
15 reporter is Tia Reidt in association with TSG Reporting.

16 Will counsel please introduce themselves.

17 MR. SCHOENHARD: Good morning. My name is Paul
18 Schoenhard. I'm an attorney with Ropes & Gray, LLP. I am
19 here today representing the Motorola defendants. And with
20 me is Ralph Palumbo from the Summit Law Group.

21 MR. PRITIKIN: David Pritikin, Sidley Austin, LLP,
22 on behalf of Microsoft and on behalf of the witness.

23 THE VIDEOGRAPHER: Will the court reporter please
24 swear the witness.
25

Highly Confidential - Attorneys' Eyes Only

Page 6

1 HORACIO E. GUTIERREZ

2 HORACIO E. GUTIERREZ, having been first duly sworn,
3 was examined and testified as follows:
4

5 EXAMINATION

6 BY MR. SCHOENHARD:

7 Q. Good morning, sir.

8 A. Good morning.

9 Q. Please state your name and home address for the
10 record.

11 A. It's Horacio Gutierrez. [REDACTED]
[REDACTED]

13 Q. And you understand that you're testifying under
14 oath here today?

15 A. I do.

16 Q. Is there any reason of which you're aware that you
17 cannot provide honest testimony today?

18 A. No.

19 Q. Have you been deposed before?

20 A. Yes.

21 Q. Approximately how many times?

22 A. Once before.

23 Q. Can you tell me briefly about the circumstances of
24 that earlier deposition?

25 A. That concerned a litigation with defendant Barnes

Highly Confidential - Attorneys' Eyes Only

Page 7

1 HORACIO E. GUTIERREZ

2 & Noble.

3 Q. You're currently employed by Microsoft?

4 A. Correct.

5 Q. What is your current position?

6 A. I'm corporate vice president and deputy general
7 counsel in charge of the intellectual property group.

8 Q. What are your responsibilities as corporate vice
9 president and deputy general counsel?

10 A. I manage the portion of the legal department of
11 Microsoft that counsels the company in connection with the
12 full range of intellectual property issues, from patents to
13 trademarks, copyrights, trade secrets, and IP licensing
14 issues.

15 Q. To whom do you report?

16 A. I report to the general counsel of Microsoft, Brad
17 Smith.

18 Q. And do you have any direct reports?

19 A. I have a number of direct reports in each of the
20 areas that I mentioned before: patents, copyrights,
21 trademarks, licensing, and other areas. The organization as
22 a whole is about 200 people.

23 Q. Approximately how many direct reports do you have?

24 A. I believe the number of direct reports is nine or
25 ten people.

Highly Confidential - Attorneys' Eyes Only

Page 8

1 HORACIO E. GUTIERREZ

2 Q. If you are able, can you list those nine or ten
3 people for me?

4 A. Sure. Bart Eppenauer is the chief patent counsel.
5 Tom Rubin is the head of the copyright and trademark team.
6 David Kaefer is the head of the IP licensing function. Matt
7 Penarczyk is the head of the IP licensing legal team. Jason
8 Albert is the head of the IP policy team.

9 Andrea Silvestrini is the chief financial officer
10 of the group. Sandy Gupta is the head of the open solutions
11 group, which manages strategic alliances and partnerships.
12 Jennifer Norris is the business manager for my group. And
13 Melaina Chambers is my executive assistant. That's nine.

14 Q. I'm not going to go through each individual, but I
15 would like to walk through a few of these individuals and
16 what their respective responsibilities are.

17 A. Sure.

18 Q. The first individual, Bart Eppenauer. Can you
19 spell Mr. Eppenauer's name for us?

20 A. Bart is B-A-R-T. Eppenauer is E-P-P-E-N-A-U-E-R.

21 Q. What are Mr. Eppenauer's responsibilities?

22 A. He manages the patent group at Microsoft. That's
23 a group of approximately 100 people that manage the process
24 of preparing to file patent applications, prosecuting the
25 patent applications, the maintenance of the patent portfolio

Highly Confidential - Attorneys' Eyes Only

Page 9

1 HORACIO E. GUTIERREZ

2 around the world, as well as performing patent analysis and
3 counseling services for the group as well as for the
4 business divisions of the companies that rely on their
5 advice.

6 Q. Does Mr. Eppenauer have any role in patent
7 litigation functions?

8 A. Indirectly. The patents group includes a patent
9 analysis team. The patent analysis team performs patent
10 analysis, analysis of a legal nature relating to patents
11 that are both asserted against Microsoft in litigation as
12 well as patents that Microsoft assert against others, both
13 in the context of licensing and litigation scenarios.

14 Q. And Mr. Eppenauer is responsible for that patent
15 analysis team?

16 A. The patent analysis team reports directly to
17 Mr. Eppenauer, yes.

18 Q. Is there an individual that is the lead of the
19 patent analysis team?

20 A. Yes. His name is John Mulgrew, M-U-L-G-R-E-W.

21 Q. Let's move on to David Kaefer.

22 A. Yes.

23 Q. Are you able to spell Mr. Kaefer's last name?

24 A. K-A-E-F-E-R.

25 Q. And what are Mr. Kaefer's responsibilities?

Highly Confidential - Attorneys' Eyes Only

Page 10

1 HORACIO E. GUTIERREZ

2 A. He is responsible for the IP licensing group.
3 That is a group comprised of lawyers as well as licensing
4 executives of different backgrounds whose job is to handle
5 negotiations relating to licensing, be them cross-licensing
6 transactions or unilateral licensing transactions.

7 Q. Does Mr. Kaefer have responsibility both for
8 inbound and outbound licensing?

9 A. Yes. Although in a company like Microsoft,
10 there's a whole range of inbound licensing transactions that
11 happen even at the product group level. There's a lot of
12 inbound copyright licensing from third parties. But when it
13 comes to inbound patent licenses, I would say he's largely
14 responsible for the whole area.

15 Q. Let's move on to Matt Penarczyk.

16 A. Yes.

17 Q. Are you able to spell Mr. Penarczyk's last name?

18 A. That's a little harder. His name -- his last name
19 is spelled P-E-N-A-R-C-Z-Y-K.

20 Q. What are Mr. Penarczyk's responsibilities?

21 A. He manages a group of attorneys that provide legal
22 and transactional support for both our licensing activities
23 as well as generally provide legal counsel to the product
24 groups on issues related to licensing.

25 Q. Does Mr. Penarczyk have a litigation function?

Highly Confidential - Attorneys' Eyes Only

Page 11

1 HORACIO E. GUTIERREZ

2 A. No, he does not.

3 Q. What are Mr. Albert's responsibilities?

4 A. He manages a small group that tracks legislative
5 and regulatory developments around the world concerning
6 intellectual property matters. That would be the team that
7 would represent Microsoft in the context of patent or other
8 IP reform efforts around the world, typically working
9 through industry associations or sometimes directly.

10 Q. For how long have you been with Microsoft?

11 A. For a little over 13 years now.

12 Q. So you arrived at Microsoft in approximately 1999?

13 A. November of 1998.

14 Q. For how long have you held your current position?

15 A. Since the summer of 2006.

16 Q. What was your immediate prior position before the
17 summer of 2006?

18 A. I was the associate general counsel in charge of
19 the legal group for the EMEA region - that's Europe, Middle
20 East and Africa - based in Europe. So in fact, you could
21 describe it as being the chief legal counsel for Microsoft
22 in that region.

23 Q. You returned stateside in approximately the summer
24 of 2006?

25 A. Correct.

Highly Confidential - Attorneys' Eyes Only

Page 12

1 HORACIO E. GUTIERREZ

2 Q. And you've been here since that time?

3 A. Correct.

4 Q. In your current position?

5 A. Yes.

6 Q. Have you personally had any involvement with
7 standard-setting organizations?

8 A. No, I have not.

9 Q. Do you oversee any of Microsoft's standards-
10 related activities?

11 A. No, I don't.

12 Q. In approximately October of 2010, you came to be
13 involved in a dispute between Motorola and Microsoft,
14 correct?

15 A. Correct.

16 Q. Mr. Gutierrez, I've handed you a document that was
17 previously marked as Heiner Exhibit 9. For the record, it
18 bears Production Nos. MOTM_ITC0064417 through 438.

19 Please take a moment to review this document and
20 tell me whether you recognize it.

21 A. Would it be possible to do something about the
22 lighting? I'm having trouble seeing the document.

23 Q. Sure. Why don't we take a short break off the
24 record and we'll see if we can...

25 MR. PALUMBO: If I could -- there's nothing that

Highly Confidential - Attorneys' Eyes Only

Page 13

1 HORACIO E. GUTIERREZ

2 can be done, I don't think.

3 MR. PRITIKIN: Might be able to --

4 THE VIDEOGRAPHER: The time is --

5 MR. PRITIKIN: I don't think we need to -- let's
6 just...

7 MR. PALUMBO: I don't think we can get it any...

8 MR. PRITIKIN: What if we open the blinds here?

9 MR. SCHOENHARD: Let's go ahead and take a quick
10 break.

11 MR. PRITIKIN: Okay. Let's see what we can do.

12 THE VIDEOGRAPHER: The time is 9:22.

13 We are going off the record.

14 (Pause in the proceedings.)

15 THE VIDEOGRAPHER: The time is 9:26.

16 We are going back on the record.

17 Proceed.

18 BY MR. SCHOENHARD:

19 Q. I believe there was a question pending, but I'll
20 go ahead and withdraw it and restate.

21 Mr. Gutierrez, you have been handed a document
22 that was previously marked as Heiner Exhibit 9. For the
23 record, it bears Production Nos. MOTM_ITC0064417 through
24 438.

25 Please take a moment to review this document and

Highly Confidential - Attorneys' Eyes Only

Page 14

1 HORACIO E. GUTIERREZ

2 tell me whether you recognize it.

3 A. (Witness peruses document.)

4 I do.

5 Q. What do you recognize this document to be?

6 A. This is a letter sent by Mr. Kirk Daily of
7 Motorola addressed to me.

8 Q. Did you receive this letter?

9 A. I did.

10 Q. Do you understand that you have been designated to
11 testify today on Microsoft's behalf with respect to
12 Microsoft's actions and response to receiving this letter?

13 A. I do.

14 MR. PRITIKIN: I think we should be clear as to
15 which questions are being posed as part of the 30(b)(6)
16 deposition and which are being posed to Mr. Gutierrez in his
17 personal capacity. And, you know, however you want to
18 handle it is fine with me, so long as it's clear on the
19 record when you're asking questions pursuant to the 30(b)(6)
20 notice.

21 MR. SCHOENHARD: Understood. I think that's
22 reasonable, especially given the limitations on the topics
23 for which Mr. Gutierrez was designated. I think that it
24 would be appropriate to start from time at which Exhibit 9
25 was passed to Mr. Gutierrez, and I expect that we'll

Highly Confidential - Attorneys' Eyes Only

Page 15

1 HORACIO E. GUTIERREZ

2 continue in his corporate capacity for some duration now.

3 If you find a line of questioning you believe to be
4 outside the scope of that, please let me know, but otherwise
5 I think we'll probably find an appropriate end time when
6 we've done -- left this line of questioning.

7 MR. PRITIKIN: That's fine.

8 BY MR. SCHOENHARD:

9 Q. Mr. Gutierrez, do you feel comfortable testifying
10 with respect to that topic today?

11 A. Yes.

12 Q. Did you do anything to prepare for your
13 deposition?

14 A. I reread this letter as well as a subsequent
15 letter received from Motorola on October 29th, and I had a
16 meeting yesterday afternoon with counsel to talk about what
17 to expect today.

18 Q. Did you meet with any other Microsoft personnel to
19 refresh your recollection as to the circumstances
20 surrounding Microsoft's receipt of this letter, Heiner
21 Exhibit 9?

22 A. No.

23 Q. At the time Microsoft received the October 21
24 letter marked as Heiner Exhibit 9, Microsoft had already
25 filed suit against Motorola with respect to certain patents,

Highly Confidential - Attorneys' Eyes Only

Page 16

1

HORACIO E. GUTIERREZ

2

correct?

3

A.

Correct.

4

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 17

1

HORACIO E. GUTIERREZ

2

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 18

1 HORACIO E. GUTIERREZ

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 Q. Returning your attention to the October 21 letter,
6 the October 21 letter reflects an offer by Motorola of a
7 patent license to Microsoft for certain patents and patent
8 applications relating to the 802.11 standards, correct?

9 A. Correct.

10 Q. Prior to receipt of the October 21, 2010 letter,
11 had Microsoft ever asked Motorola for a license to any of
12 its 802.11 standard-essential patents?

13 A. Not that I'm aware of.

14 Q. Prior to October 21 of 2010, was Microsoft aware
15 that Motorola had patents that were essential to the 802.11
16 standards?

17 MR. PRITIKIN: I'm going to object to the question
18 as outside the scope of the 30(b)(6) topics for which
19 Mr. Gutierrez has been designated.

20 We can treat that as part of the personal
21 deposition if you would like.

22 MR. SCHOENHARD: I'm comfortable treating that as a
23 personal question.

24 MR. PRITIKIN: All right. You can answer the
25 question.

Highly Confidential - Attorneys' Eyes Only

Page 19

1 HORACIO E. GUTIERREZ

2 THE WITNESS: I was personally not aware of
3 Motorola's patent ownership in the field.

4 BY MR. SCHOENHARD:

5 Q. Do you know whether Microsoft as a corporation had
6 awareness of Motorola's ownership of certain
7 standard-essential patents?

8 MR. PRITIKIN: Now we're off the 30(b)(6)
9 designation, so you're testifying in your personal capacity,
10 Mr. Gutierrez, if you know the answer.

11 THE WITNESS: Your question is not limited to
12 802.11 anymore? You're talking about standard-essential
13 patents generally?

14 BY MR. SCHOENHARD:

15 Q. If so, I misspoke and I apologize.

16 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 20

1

HORACIO E. GUTIERREZ

2

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 21

1

HORACIO E. GUTIERREZ

2

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED] [REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED] [REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 22

1

HORACIO E. GUTIERREZ

2

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

2



Highly Confidential - Attorneys' Eyes Only

Page 24

1 HORACIO E. GUTIERREZ

2 A. I don't recall the timeline specifically.

3 Q. Do you know whether Microsoft performed a
4 financial valuation of its 802.11 standards-essential patent
5 portfolio?

6 MR. PRITIKIN: The same instruction, Mr. Gutierrez.

7 THE WITNESS: Can you repeat the question?

8 BY MR. SCHOENHARD:

9 Q. Do you know whether Microsoft performed a
10 financial valuation of its 802.11 standards-essential
11 patents?

12 A. I don't believe so.

13 Q. The October 21, 2010 letter suggests or -- let me
14 start over.

15 The October 21, 2010 letter marked as Heiner
16 Exhibit 9 includes a statement of an offer to license
17 Motorola's 802.11 standards-essential patents on reasonable
18 and nondiscriminatory condition- -- terms and conditions,
19 including a reasonable royalty of 2.25 percent per unit for
20 each 802.11 compliant product, correct?

21 A. The letter has those terms, "reasonable" and
22 "nondiscriminatory." I would strongly disagree with the
23 notion that the letter in fact contains an offer that is
24 reasonable and nondiscriminatory.

25 Q. Why is that?

Highly Confidential - Attorneys' Eyes Only

Page 25

1 HORACIO E. GUTIERREZ

2 A. There are many reasons. I mean, anybody who
3 understands this field that reads this letter would
4 understand that there are condition upon condition that
5 would make it unreasonable. And I can list a few, if you
6 want.

7 Q. Please do.

8 A. First of all, a royal -- the royalty rate is, in
9 my opinion, abusive for a couple of reasons.

10 First of all, the base that's used for the
11 calculation of the royalty base is not the value of the
12 product that Microsoft produces but instead is the overall
13 value of the ultimate device on which -- for which our
14 product is a component. So the rate would be applied not on
15 the cost of the Microsoft software program that implements
16 the standard, but let's say on Dell's full server or PC,
17 which greatly inflates the royalty and essentially collects
18 on value that has nothing to do with the value of the
19 contribution of Motorola to the standard.

20 The royalty of two and a quarter percent per unit
21 is, in and of itself, in the realm of standard-essential
22 patents for products of this nature, outrageously high, and
23 it is especially excessive when one considers that that is
24 the net royalty they would expect to charge after having
25 received the benefit of a full cross-license of Microsoft

Highly Confidential - Attorneys' Eyes Only

Page 26

1 HORACIO E. GUTIERREZ

2 patents in the field. So it's basically a net royalty of
3 two and a quarter percent on top of what would be for them a
4 free license of the full Microsoft portfolio in the field.

5 So under those circumstances, [REDACTED]

6 [REDACTED]
7 [REDACTED] I took this letter to be essentially a formality
8 enabling Motorola to go ahead with filing litigation against
9 Microsoft and not really a serious attempt at negotiating a
10 license, because the terms were so out of the universe of
11 what is reasonable, given the nature of the technology.

12 Q. I'd like to walk through a few of the items you
13 mentioned and talk through them in a bit more detail. One
14 you mentioned, the relationship between the royalty and the
15 end product.

16 A. Yes.

17 Q. Which end products do you understand would be
18 implicated by the offer in the October 21, 2010 letter?

19 A. Well, the letter really does not specify any
20 products. It uses a couple products as examples. So I took
21 that to mean that it really applied to any and all Microsoft
22 products that implemented the 802.11 standard. And you
23 know, that, you know, to my mind, basically applied to a
24 large portion of the -- of the products that Microsoft
25 ships, or could potentially apply to a large portion of the

Highly Confidential - Attorneys' Eyes Only

Page 27

1 HORACIO E. GUTIERREZ

2 products that Microsoft ships.

3 So this royalty demand alone would essentially, in
4 my mind, be a two and a quarter percent royalty demand on
5 the bulk of Microsoft revenues.

6 Q. Did you ask anyone at Motorola whether this offer
7 was intended to cover a wide range of products beyond those
8 that are particularly identified here?

9 A. I think the letter was actually quite clear about
10 it. The letter says in the first paragraph that "Motorola
11 offers a license to license the patents for a two and a
12 quarter percent per unit royalty for each 802.11 compliant
13 product."

14 So there isn't really ambiguity there. They're
15 basically saying that any product that implemented --
16 included a compliant implementation of 802.11 would be
17 subject to the royalty.

18 Q. Do you know as of October 21, 2010, which
19 Microsoft products were 802.11 compliant?

20 A. Well, 802.11, as far as I understand it, is the
21 predominant standard used for Wi-Fi connectivity. So my
22 assumption was that the majority of personal computers,
23 Xboxes, tablets and phones, just to name a few, would rely
24 on some kind of implementation of the standard, whether that
25 be as part of the operating system or otherwise part of the

Highly Confidential - Attorneys' Eyes Only

Page 28

1 HORACIO E. GUTIERREZ

2 device as a whole.

3 Q. Do you know whether as of October 21, 2010,
4 Microsoft distributed any software for personal computers
5 that was 802.11 compliant?

6 A. I don't know the answer to that, but I assume that
7 we did.

8 Q. Did you perform any investigation to determine
9 whether you did?

10 A. I believe the litigation team working with --

11 MR. PRITIKIN: Well, you should not testify about
12 conversations that you had with lawyers that relate to the
13 subject matter of litigation, so I would instruct you not to
14 answer the question to the extent you need to reveal the
15 substance of privileged communications.

16 Let me hear the question back.

17 (The following encompasses the entire readback
18 portion.)

19 "Q. Did you perform any investigation to determine
20 whether you did?"

21 (Whereupon, the readback was concluded.)

22 THE WITNESS: I didn't personally perform such
23 investigation. I believe that to have been in the scope of
24 the review that others performed.

25 BY MR. SCHOENHARD:

Highly Confidential - Attorneys' Eyes Only

Page 29

1 HORACIO E. GUTIERREZ

2 Q. In response to receiving the October 21, 2010
3 letter, did Microsoft investigate which of its products
4 would be considered licensed under the offer in the
5 October 21 letter?

6 MR. PRITIKIN: And that question also gets into the
7 subject matter that may be privileged. You can answer the
8 question "yes" or "no" or you don't recall based on your own
9 personal knowledge, but you should not reveal the substance
10 of any information that you received from lawyers relating
11 to that subject.

12 THE WITNESS: Yes.

13 BY MR. SCHOENHARD:

14 Q. Did Microsoft determine that any of its products
15 other than Xbox 360 related products would be considered
16 802.11 compliant products under the terms of the offer of
17 the October 21 letter?

18 MR. PRITIKIN: And I'm going to instruct the
19 witness not to answer the question on grounds of
20 attorney-client and work-product privilege.

21 MR. PALUMBO: Could you raise your voice a little
22 bit? I'm having trouble hearing you.

23 MR. PRITIKIN: Sure.

24 Will you read back my objection?

25 THE COURT REPORTER: I'm having a little trouble

Highly Confidential - Attorneys' Eyes Only

Page 30

1 HORACIO E. GUTIERREZ

2 hearing you, too.

3 MR. PRITIKIN: Is the microphone not --

4 THE COURT REPORTER: It's not very loud, no.

5 MR. PRITIKIN: I'm going to instruct the witness
6 not to answer the question on grounds of attorney-client and
7 work-product privilege.

8 MR. PALUMBO: Thank you.

9 BY MR. SCHOENHARD:

10 Q. As of October 21, 2010, were you personally aware
11 of any Microsoft products other than the Xbox 360 that were
12 802.11 compliant?

13 MR. PRITIKIN: Now, this is a question that is
14 outside the scope of the 30(b)(6) designation. Do you want
15 to ask this in his personal capacity?

16 BY MR. SCHOENHARD:

17 Q. Let me rephrase.

18 As of October 21, 2010, did Microsoft sell any
19 802.11 compliance products other than the Xbox 360 related
20 products?

21 A. I don't know.

22 MR. PRITIKIN: And I think that is outside the
23 scope of the 30(b)(6) topics, so we'll take that answer to
24 be in his personal capacity, if that's something that you're
25 interested in pursuing. Pursuant to a 30(b)(6) designation,

Highly Confidential - Attorneys' Eyes Only

Page 31

1 HORACIO E. GUTIERREZ

2 this is not the right witness for that question.

3 BY MR. SCHOENHARD:

4 Q. A moment ago you also referred to the 2.25 percent
5 per unit number identified in the October 21, 2010 letter as
6 a net royalty, correct?

7 A. Yes. That's what I understood it to be.

8 Q. Upon receipt of the October 21, 2010 letter, did
9 you understand that Motorola intended for the 2.25 percent
10 per unit royalty offer to be subject to a grant-back which
11 might ultimately lower the effective royalty percentage?

12 A. No, I did not. I read the letter to mean what it
13 said, which is that the royalty payable to Motorola would be
14 two and a quarter percent per unit for each 802.11 compliant
15 product subject to the grant-back; that is, including the
16 grant-back.

17 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 32

1

HORACIO E. GUTIERREZ

2

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED] [REDACTED]

•

[REDACTED]

•

[REDACTED] [REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED] [REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED] [REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED] [REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED] [REDACTED]

•

[REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 33

1

HORACIO E. GUTIERREZ

2

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 34

1 HORACIO E. GUTIERREZ

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

7 Q. Sitting here today, do you have any reason to
8 believe that in response to the October 21, 2010 letter,
9 Microsoft contacted Motorola to determine what Motorola
10 intended by the language "Subject to a grant-back license
11 under the 802.11 essential patents of Microsoft"?

12 A. I'm sorry. Repeat the question.

13 MR. SCHOENHARD: Could you read that back, please?

14 (The following encompasses the entire readback
15 portion.)

16 "Q. Sitting here today, do you have any reason to
17 believe that in response to the October 21, 2010 letter,
18 Microsoft contacted Motorola to determine what Motorola
19 intended by the language 'Subject to a grant-back license
20 under the 802.11 essential patents of Microsoft'?"

21 (Whereupon, the readback was concluded.)

22 THE WITNESS: I don't know if that happened.

23 BY MR. SCHOENHARD:

24 Q. In response to the October 21, 2010 letter, did
25 Microsoft apply for a license to Motorola's 802.11

Highly Confidential - Attorneys' Eyes Only

Page 35

1 HORACIO E. GUTIERREZ

2 standard-essential patent portfolio?

3 A. No. And I don't believe that was Motorola's
4 expectation after sending this letter.

5 Q. Does the October 21, 2010 letter specify any term
6 for the proposed license?

7 A. They did mention at the end in the letter that the
8 offer would be open for 20 days.

9 Q. Does the October 21, 2010 letter identify what the
10 license term would be?

11 A. The letter doesn't identify it on its face, as far
12 as I can tell.

13 Q. Does the October 21 letter identify whether such a
14 license would have a defensive suspension provision?

15 A. No, it doesn't.

16 Q. Would you agree that the October 21 letter is
17 lacking many of the terms of a typical patent license
18 agreement?

19 A. The letter on its face doesn't purport to be a
20 detailed licensing contract, no. But I think it is also
21 appropriate to assume that many -- that there are a set of
22 terms that are common in the industry that -- you know, and
23 there may be even special practices in specific areas of
24 technologies that constitute the custom of how those
25 licenses are done, so -- but I think the most important

Highly Confidential - Attorneys' Eyes Only

Page 36

1 HORACIO E. GUTIERREZ

2 point is in reading this letter there were such significant
3 hurdles to Microsoft, even considering the economic terms
4 that were being offered, that discussion of subsidiary order
5 issues such as defensive suspension and things like that
6 were really out of the question.

7 Typically the economic terms are discussed and then
8 the details of some of the provisions that don't necessarily
9 affect the economics can be negotiated later. And for the
10 most part, my experience is that once there is a general
11 economic agreement, the negotiation of the other terms is
12 less controversial.

13 Q. Upon receipt of the October 21, 2010 letter, did
14 Microsoft view the letter as an offer to which it could
15 simply respond "we accept" and have a binding contract form?

16 A. Well, the letter in and of itself stated that
17 Motorola expected an acceptance of the offer as stated in
18 the letter, so we took it to mean what it said,
19 understanding that there would be contractual formalities
20 that would follow in the event that we accepted the economic
21 offer.

22 Q. You referred to the October 21, 2010 letter as
23 appearing to be something that Motorola could use to
24 ultimately fight a lawsuit, correct?

25 A. Yes. That was our interpretation, that they sent

Highly Confidential - Attorneys' Eyes Only

Page 37

1 HORACIO E. GUTIERREZ

2 this letter knowing full well that it would be unacceptable
3 to Microsoft and set a short term for acceptance that was
4 unrealistic given the nature of the analysis that would have
5 to be performed. So the clear indication to us of those
6 circumstances was that they really had no intention of
7 having this effort conclude in a license but was just a
8 formality required by them to be able to file suit.

9 Q. Does the October 21 letter include any direct
10 threat of suit?

11 A. Well, the letter makes a royalty offer, has a --
12 indicates specific terms upon which we would have to accept
13 the offer. And in the world of IP, the clear meaning of
14 that set of terms is that failing an acceptance of the
15 offer, Motorola would exercise its rights to enforce its
16 intellectual property.

17 Q. Do you know what would have happened if Microsoft
18 had responded to Motorola with a counteroffer?

19 A. You're asking me to speculate what Motorola would
20 have done in that case. I'm not sure I can.

21 Q. Did Microsoft, upon receipt of the October 21,
22 2010 letter, have any expectation as to what Motorola's
23 response would be to a counteroffer?

24 [REDACTED]
[REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 38

1

HORACIO E. GUTIERREZ

2

•

•

•

•

•

•

•

•

•

•

•

•

15

Q. Upon receipt of the October 21, 2010 letter, is it correct to say that you did not believe the 2.25 percent per unit offer was reasonable?

18

A. Correct.

19

Q. Has Microsoft ever engaged in other licenses that involved royalties at the level of 2.25 percent per unit?

21

MR. PRITIKIN: Now, this is outside the scope of the 30(b)(6) designation, but you can answer that in your personal capacity.

24

THE WITNESS:

Highly Confidential - Attorneys' Eyes Only

Page 39

HORACIO E. GUTIERREZ

1
2 type of approach of a percentage royalty at that level, but
3 I would say that it -- you know, not all technology fields
4 are the same when it comes to licenses, and the particular
5 contribution of a party's invention has to be measured
6 relative to the value that it confers to the product in
7 which it is incorporated.

8 So I would say from my experience in license, for
9 example, if you think of the cellular wireless patent
10 portfolio and you think of the largest patent holders in
11 this space, Qualcomm or Broadcom or some of those companies,
12 I think you're -- you know, in the beginning of the
13 development of mobile devices, you probably will find patent
14 licenses that have that kind of royalty, because the
15 function of the mobile device or the phone was really to
16 make voice calls, and without, that technology wouldn't have
17 been different.

18 Here you're talking about technologies that are,
19 you know, really the subject of thousands of patents by
20 different parties around the world. And the contribution of
21 the inventions of, you know, Motorola specifically to the
22 overall standard I think is, if anything, just minor and
23 incremental.

24 So I think royalty rates have to be judged based on
25 a case-by-case basis as opposed to making broad

Highly Confidential - Attorneys' Eyes Only

Page 40

1 HORACIO E. GUTIERREZ

2 generalizations about the adequacy of a rate. I think
3 they're very context specific.

4 When we've used percentage rates, at least my
5 experience has been that generally the rate hasn't been
6 nearly as high as the percentage per unit rate that is being
7 sought by Motorola here, and certainly that it hasn't been
8 applied on a third party's finished product as opposed to on
9 the basis of the value of the product of the licensee.

10 MR. PRITIKIN: We've been going for about an hour.
11 Is this a good time to take a break?

12 MR. PALUMBO: Sure.

13 BY MR. SCHOENHARD:

14 Q. Well, let me ask just one quick follow-up question
15 just while it's fresh in your mind, Mr. Gutierrez.

16 In your last answer, you referred to Microsoft's
17 contribution in this area as being incremental. I assume
18 you're referring to the 802.11 space?

19 A. I was not referring to Microsoft's contribution.
20 I was referring to Motorola's contribution.

21 Q. I apologize. I misspoke.

22 In your earlier answer, you referred to Motorola's
23 contribution in this area, to which I assumed you're
24 referring to 802.11, as incremental, correct?

25 A. Yes, "incremental" meaning a partial contribution

Highly Confidential - Attorneys' Eyes Only

Page 41

1 HORACIO E. GUTIERREZ

2 to the standard in a situation in which there were multiple
3 other companies also contributing IP to it.

4 Q. On what do you base your view that Motorola's
5 contribution to the 802.11 standards is incremental?

6 A. Just my general understanding of the number of
7 patent holders who claim to have essential patents in the
8 field.

9 Q. And do you have knowledge as to what the
10 contribution of each of those patent holders is?

11 A. No, not specifically. That would require a level
12 of engineering analysis that I haven't performed.

13 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
19 [REDACTED]
20 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 42

1

HORACIO E. GUTIERREZ

2

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 43

1 HORACIO E. GUTIERREZ

2 We are going off the record.

3 (Pause in the proceedings.)

4 THE VIDEOGRAPHER: The time is 10:31.

5 We are going back on the record.

6 Proceed.

7 BY MR. SCHOENHARD:

8 Q. In response to receiving the October 21, 2010
9 letter, did Microsoft investigate whether Motorola had
10 offered a 2.25 percent royalty for its 802.11
11 standard-essential patents to other parties?

12 A. I recall having asked whether we were aware of any
13 previous --

14 MR. PRITIKIN: Mr. Gutierrez, you should not
15 testify about any conversations you may have had with
16 attorneys relating to the subject matter. So if you can
17 answer the question without reference to conversations you
18 had with counsel, that's fine; otherwise I would instruct
19 you not to answer.

20 We specifically objected to the scope of the
21 30(b)(6) notice insofar as it calls for privileged
22 information.

23 THE WITNESS: Repeat the question, please.

24 BY MR. SCHOENHARD:

25 Q. In response to the October 21, 2010 letter, did

Highly Confidential - Attorneys' Eyes Only

Page 44

1 HORACIO E. GUTIERREZ

2 Microsoft investigate whether Motorola had offered a
3 2.25 percent royalty for its 802.11 standard-essential
4 patents to other parties?

5 A. I don't know how to answer that question without
6 getting into the privilege issue.

7 MR. PRITIKIN: Then you should not answer the
8 question. I'll instruct you not to answer.

9 BY MR. SCHOENHARD:

10 Q. Are you able to answer that "yes" or "no" or "I
11 don't know"?

12 A. Yes, I think if that's fine from a privilege
13 perspective.

14 Q. In response to the October 21, 2010 letter, did
15 Microsoft investigate whether Motorola had offered a
16 2.25 percent royalty for its 802.11 standard-essential
17 patents to any other parties? And you can answer "yes,"
18 "no," or "I don't know."

19 A. Yes.

20 Q. Do you know what the results of that investigation
21 were?

22 MR. PRITIKIN: You can answer the question "yes" or
23 "no" or you don't recall, but you shouldn't testify about
24 any communications you had with counsel.

25 THE WITNESS: Yes.

Highly Confidential - Attorneys' Eyes Only

Page 45

1 HORACIO E. GUTIERREZ

2 BY MR. SCHOENHARD:

3 Q. In response to the October 21, 2010 letter, did
4 Microsoft learn that Motorola had offered a 2.25 percent
5 royalty for its 802.11 standard-essential patents to other
6 parties?

7 MR. PRITIKIN: Let me hear that question again.

8 (The following encompasses the entire readback
9 portion.)

10 "Q. In response to the October 21, 2010 letter, did
11 Microsoft learn that Motorola had offered a 2.25 percent
12 royalty for its 802.11 standard-essential patents to other
13 parties?"

14 (Whereupon, the readback was concluded.)

15 MR. PRITIKIN: So Mr. Gutierrez, to the extent you
16 received information from counsel or as part of the work
17 product that was associated with the litigation, you should
18 not answer the question. If he is asking you about
19 conversations that you had with Mr. Daily or others at
20 Motorola, you can testify about the conversations you had
21 with the Motorola representatives.

22 THE WITNESS: I can't answer the question without
23 reference to attorney work product conversations.

24 MR. PRITIKIN: Then I instruct you not to answer.

25 BY MR. SCHOENHARD:

Highly Confidential - Attorneys' Eyes Only

Page 46

1 HORACIO E. GUTIERREZ

2 Q. At any time in the wake of the October 21, 2010
3 letter, did Motorola inform Microsoft that it was not
4 willing to negotiate the terms that it offered?

5 A. I'm not aware of that.

6 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

16 Q. In reaching its position that a 2.25 percent per
17 unit royalty was unreasonable, did Microsoft determine what
18 would have been a reasonable royalty rate?

19 MR. PRITIKIN: Again, to the extent that the answer
20 would require you to reveal discussions or conversations you
21 had with counsel, I would instruct you not to answer.

22 THE WITNESS: I can't answer the question.

23 I'm sorry. Your guidance is if this results from
24 my conversations with others in the legal team, I can't -- I
25 shouldn't answer?

Highly Confidential - Attorneys' Eyes Only

Page 47

1 HORACIO E. GUTIERREZ

2 MR. PRITIKIN: That's correct.

3 THE WITNESS: And the question is?

4 MR. PRITIKIN: Can we have it back?

5 (The following encompasses the entire readback
6 portion.)

7 "Q. In reaching its position that a 2.25 percent
8 per unit royalty was unreasonable, did Microsoft determine
9 what would have been a reasonable royalty rate?

10 (Whereupon, the readback was concluded.)

11 THE WITNESS: Let me just explain that the process
12 by which a reasonable royalty can be calculated is
13 incredibly complex and context specific and that it really
14 wasn't necessary to try to make that determination in that
15 context because we were on a path for a broader resolution
16 of the claims between the companies.

17 So you know, we -- we knew for a fact in reading
18 this letter that this royalty demand was clearly beyond
19 anything that could be considered reasonable and
20 nondiscriminatory, and that sort of, you know, was clear to
21 us on the face of the letter.

22 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 48

1 HORACIO E. GUTIERREZ

2 BY MR. SCHOENHARD:

3 Q. You referred to the process of arriving at a
4 reasonable royalty rate as complex.

5 A. Yes.

6 Q. What is involved in arriving at a reasonable
7 royalty rate?

8 MR. PRITIKIN: And I object to this as outside the
9 scope of the 30(b)(6) notice. If we're back on the personal
10 deposition, he can answer it.

11 BY MR. SCHOENHARD:

12 Q. Let's go ahead and proceed down this line of
13 questioning in your personal capacity.

14 A. When you ask that question, I assume that you're
15 referring to reasonable royalty rates in the context of
16 standard-essential patents for which a RAND commitment has
17 been made.

18 Q. Let's take a couple steps back, then. And again,
19 this line of questioning will be in your personal capacity.
20 We'll shift back to your corporate role momentarily.

21 Are you familiar with the concept of RAND?

22 A. Yes.

23 Q. RAND stands for "reasonable and
24 nondiscriminatory," correct?

25 A. Correct.

Highly Confidential - Attorneys' Eyes Only

Page 49

1 HORACIO E. GUTIERREZ

2 Q. Does RAND mean the same thing to every standard-
3 setting organization?

4 A. I think the fair answer would be that there's a
5 range of interpretations of what it is and that, you know,
6 the concepts are relatively well understood and talked
7 about, but the actual practical application has a lot of
8 variability.

9 Q. Are you familiar with the concept of RAND within
10 the context of the IEEE?

11 A. Yes.

12 Q. And you would agree that determining what is
13 reasonable and nondiscriminatory in the context of an 802.11
14 related license would be complex?

15 A. I think not necessarily as a function of the IEEE
16 process. I think in general there are a number of
17 considerations to be taken into account in determining RAND,
18 and there are different -- a range of views, depending on
19 which firm you ask us, to what constitutes RAND.

20 Q. What factors do you have in mind when you say
21 there are multiple factors that relate to what is RAND?

22 A. Well, I think in the context of patents reading on
23 a standard, you know, the first thing you look at is does --
24 is the patent really essential to an implementation of the
25 standards. So there's a question of essentiality, and there

Highly Confidential - Attorneys' Eyes Only

Page 50

1 HORACIO E. GUTIERREZ

2 -- standards organizations sometimes have processes to
3 determine that; although in other cases, firms just self-
4 declare certain patents as being standard. So the first
5 question that one needs to ascertain is, is the patent truly
6 essential.

7 And then the second question is, what is the
8 incremental inventive contribution, to refer to it in some
9 way, that the patent holder in that case made to the
10 standard? And that is obviously a determination that
11 depends on what the overall standard is, what the components
12 of the specification are, who contributed what and to what
13 extent does that contribution really add to the value of the
14 standard.

15 And then there's another set of principles -- and
16 this is just an enumeration. I don't think it would be
17 exclusive. But the next step is, is the royalty fairly
18 compensating the patent holder for the incremental
19 contribution that it did to the standard or is it really
20 capitalizing on the value -- the incremental value, the
21 standard achieved after being adopted; that is, the people
22 in the area would refer to this, are the royalties based on
23 an ex-ante analysis of the value of the technology itself
24 that was contributing to the standard or is it really taxing
25 the value that the standard achieved ex-post after being

Highly Confidential - Attorneys' Eyes Only

Page 51

1 HORACIO E. GUTIERREZ

2 adopted broadly by people in the technology field?

3 And then the last set of issues, and I said -- not
4 really the last, but another set of issues that one would
5 consider is, you know, is the royalty rate one that is
6 arrived at through the normal market base mechanisms for
7 negotiation or is it a royalty raised -- rate that is
8 arrived at essentially by threatening stoppage of the sales
9 of the products of the licensee. So we do believe that the
10 injunction disturbs the normal market base negotiation of a
11 royalty rate, and it's the equivalent of conducting a
12 negotiation at gunpoint.

13 So these are a number of factors. This is why it's
14 so complex, and I don't even think I've even mentioned all
15 of the dimensions that one would consider in determining
16 whether something is RAND. But it is technology specific,
17 it's market specific, it is very dependent on the nature of
18 the standard and how it's described in the implementation.

19 It's also depending by, you know, the time at which
20 the contribution was made, as opposed to a later time when
21 the standard is broadly adopted and incorporated into a
22 larger or more complex product that has other elements
23 contributing to its utility and value.

24 Q. You agree that a RAND royalty rate is typically
25 arrived at through a market-type process of bilateral

Highly Confidential - Attorneys' Eyes Only

Page 52

1 HORACIO E. GUTIERREZ

2 negotiation, correct?

3 A. That is one way through which those rates are
4 arrived at. Another way that is not uncommon in the area of
5 standards is through the creation of patent pools that
6 provide an efficient way for broad licensing of IP rights
7 relating to a standard.

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]
29 [REDACTED]
30 [REDACTED]
31 [REDACTED]
32 [REDACTED]
33 [REDACTED]
34 [REDACTED]
35 [REDACTED]
36 [REDACTED]
37 [REDACTED]
38 [REDACTED]
39 [REDACTED]
40 [REDACTED]
41 [REDACTED]
42 [REDACTED]
43 [REDACTED]
44 [REDACTED]
45 [REDACTED]
46 [REDACTED]
47 [REDACTED]
48 [REDACTED]
49 [REDACTED]
50 [REDACTED]
51 [REDACTED]
52 [REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 53

1 HORACIO E. GUTIERREZ

2 [REDACTED]

3 Q. In response to receiving the October 21, 2010
4 letter, did Microsoft endeavor to determine whether each of
5 the patents listed in the annex to the October 21 letter is
6 in fact essential to the 802.11 standard?

7 MR. PRITIKIN: And again, this gets into the
8 subject matter of work-product and attorney-client
9 privilege. If you would need to reveal communications you
10 had with counsel to answer the question, then I'm going to
11 instruct you not to answer.

12 THE WITNESS: I cannot answer the question without
13 alluding to conversations with counsel.

14 MR. PRITIKIN: You should not get into that subject
15 matter.

16 BY MR. SCHOENHARD:

17 Q. Are you able to answer that question "yes" or "no"
18 or "I don't know"?

19 MR. PRITIKIN: Let me hear the question again.

20 MR. SCHOENHARD: Perhaps it would be easier if I
21 restated it.

22 BY MR. SCHOENHARD:

23 Q. In response to receiving the October 21, 2010
24 letter, did Microsoft endeavor to determine whether each of
25 the patents or patent applications listed in the annex to

Highly Confidential - Attorneys' Eyes Only

Page 54

1 HORACIO E. GUTIERREZ

2 the October 21 letter is in fact essential to the 802.11
3 standard?

4 MR. PRITIKIN: And I think that intrudes on the
5 attorney-client work-product privilege, and I'm going to
6 instruct the witness not to answer based on what he told us
7 a few minutes ago.

8 MR. SCHOENHARD: You will not permit the witness to
9 answer "yes" or "no"?

10 MR. PRITIKIN: No.

11 BY MR. SCHOENHARD:

12 Q. The October 21, 2010 letter states in its second
13 paragraph, "As a convenience to its licensees, Motorola
14 includes all of the patents listed on its 802.11 annex in
15 the license without regard to further proof of technical
16 essentiality to the 802.11 standards."

17 Do you see that?

18 A. Yes.

19 Q. Did you understand that statement to imply that
20 some of the patents identified in the annex to the October
21 21, 2010 letter may not in fact have been essential to the
22 802.11 standards?

23 A. No, I did not.

24 Q. What did you understand that statement to mean?

25 A. Well, I believe the statement says that they

Highly Confidential - Attorneys' Eyes Only

Page 55

1 HORACIO E. GUTIERREZ

2 consider them essential but that they're not providing proof
3 of technical essentiality, just providing a list for our
4 convenience.

5 Q. Among the items you identified as contributing
6 factors to determine whether something is RAND was whether
7 patents are essential, correct?

8 A. Correct.

9 Q. In the second sentence of the second paragraph of
10 the October 21, 2010 letter, do you see the second sentence,
11 "If Microsoft is only interested in licensing some portion
12 of this portfolio, Motorola is willing to enter into such a
13 license also on RAND terms"?

14 A. Yes, I do.

15 Q. What did Microsoft understand that statement to
16 mean?

17 A. I have to admit I was somewhat puzzled by that
18 statement.

19 If a patent -- you know, if a product implements a
20 standard in a compliant manner, and Motorola believes that
21 their patents are essential to the implementation of a
22 compliant implementation of the standard, then licensing
23 only a subset of the patents is not going to solve the
24 infringement process.

25 So it was really hard for me to envision how a

Highly Confidential - Attorneys' Eyes Only

Page 56

1 HORACIO E. GUTIERREZ

2 partial license would work, given the claims and the
3 statements they had made in the previous paragraph and in
4 the immediately preceding sentence.

5 Q. Would you agree that a pending patent application
6 upon issuance may not in fact be standard essential, even if
7 it is expected to be during the time of prosecution?

8 A. It is possible. But on the other hand, why would
9 you enter into a license covering a field and leave patent
10 applications out that later on could be asserted against you
11 as a result of the implementation of the exact same
12 standard?

13 Q. Upon receipt of the October 21, 2010 letter, did
14 Microsoft understand that the annex to the October 21 letter
15 included patent applications in addition to issued patents?

16 A. Yes. The annex refers to a small subset of the
17 assets listed in it as filed, I suppose, to granted, which I
18 take it to mean those relate to patents that are pending but
19 not granted yet.

20 Q. And upon receipt of the October 21, 2010 letter,
21 Microsoft understood that pending patent applications may
22 not in fact issue, correct?

23 A. I think that would come from general experience in
24 the field. Sometimes patents don't issue or are abandoned
25 before issuance.

Highly Confidential - Attorneys' Eyes Only

Page 57

HORACIO E. GUTIERREZ

1
2 Q. And upon receipt of the October 21, 2010 letter,
3 Microsoft understood that the patent applications identified
4 in the annex to the October 21 letter upon issuance,
5 assuming they issued, may not in fact be standard essential,
6 correct?

7 A. Yeah. I think as I said, based on some general
8 experience in terms of how these things work, we understood
9 that some patents might not issue, or if issued, they might
10 not read on the standard; however, in the context of this
11 document, the patents that were not issued were a relatively
12 minor portion of the overall package. And Motorola, being a
13 sophisticated patent filer in the area of industry
14 standards, I think it was fair to assume that there was a
15 high probability that the majority if not all of those
16 applications would eventually result in a granted patent.

17 Q. Did Microsoft, upon receipt of the October 21,
18 2010 letter, ask Motorola what royalty rate it would expect
19 to receive for only the portion of the patent portfolio
20 identified in the annex of the October 21 letter that is in
21 fact essential to the 802.11 standards?

22 A. As I mentioned before, I took the letter to state
23 on behalf of Motorola that they took the position that these
24 standards-essential patents and patent applications were, in
25 their view, essential to the standard. So I don't believe

Highly Confidential - Attorneys' Eyes Only

Page 58

1 HORACIO E. GUTIERREZ

2 we would have had occasion or reason to pursue that kind of
3 discussion with Motorola.

4 Furthermore, as I said, the course of the licensing
5 negotiations between the parties that started around the
6 time when this letter was sent really took a different
7 course that did not involve a patent-by-patent analysis of
8 the patents listed in the annex to this letter.

9 Q. Did Motorola state anywhere in the October 21,
10 2010 letter a position that each of the patents and patent
11 applications in the annex to the letter is in fact essential
12 to the 802.11 standards?

13 A. That was my interpretation of the meaning of the
14 letter based on the language on the face of the letter.

15 Q. And if I understood you correctly, Microsoft did
16 not approach Motorola and ask Motorola what its rate would
17 be for any subset of the portfolio identified in the annex
18 to the October 21, 2010 letter?

19 A. No. And to be clear, if you look at the first
20 paragraph of the letter, the two and a quarter percent rate
21 is defined at the top of the letter as referring to patents
22 and pending applications having claims that may be or become
23 essential patents.

24 So our reading of the letter, based on what the
25 letter says on its face, is that even if some of these

Highly Confidential - Attorneys' Eyes Only

Page 59

1 HORACIO E. GUTIERREZ

2 patent applications didn't issue or ended up being issued in
3 a way that don't read on the standard, that the subset that
4 is essential would command the two and a quarter percent
5 royalty rate set in there.

6 That is what the letter says. The letter at the
7 top says, "This is to confirm Motorola's offer to grant
8 Microsoft a worldwide nonexclusive license under Motorola's
9 portfolio of patents and pending applications having claims
10 that may be or become essential patent claims as defined in
11 Section 6.1 on the IEEE bylaws."

12 So essentially they were providing for convenience
13 a list of patents that they believed were essential to the
14 standard and indicating at the top of the letter that the
15 offer and the royalty applied to those patents and patent
16 applications that contained essential patent claims.

17 So the offer -- you know, the way one reads the
18 letter is that Motorola believes they have essential patents
19 that read on the standard and they made an offer for a two
20 and a quarter percent per unit royalty based on the final --
21 the finished product that would cover any and all patents in
22 that field. And that was without regard.

23 So when I say I was puzzled by the point they make
24 in the second sentence of the second paragraph, you know,
25 that was part of the reason why it was puzzling. And it was

Highly Confidential - Attorneys' Eyes Only

Page 60

1 HORACIO E. GUTIERREZ

2 also because to the extent that the patents were essential,
3 you really couldn't rationally choose some essential patents
4 but not the others, because you would remain exposed for an
5 assertion of those patents.

6 So again, those kinds of things were things that
7 contributed to our reading of the letter as not really
8 representing objectively a RAND offer, but instead just a
9 step in the process that they had identified to us, which
10 would result in the filing of litigation against Microsoft.

11 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

20 Q. Do I understand you correctly, then, that you did
21 not reach out to Motorola to convey your confusion about the
22 meaning of the second sentence of the second paragraph of
23 the October 21 letter?

24 A. No. I took that sentence to be subsidiary to the
25 content of the offer in the first paragraph, and I took it

Highly Confidential - Attorneys' Eyes Only

Page 61

1 HORACIO E. GUTIERREZ

2 to mean that generally they would expect a license covering
3 all of the essential patent claims at the royalty rate
4 stated in the first paragraph.

5 Q. The sentence you've referred to in the first
6 paragraph refers to a portfolio of patents and patent
7 applications having claims that may be or become essential
8 patent claims, correct?

9 A. Correct.

10 Q. Do you understand the word "may" not to mean
11 "definitely are"?

12 A. I do. And I also understand that they're asking
13 for a two and a quarter percent per unit royalty for
14 whatever it is that ultimately ends up being a patent --
15 essential patent claim.

16 Q. In the second paragraph of the October 21 letter,
17 did you understand the first sentence to be telling
18 Microsoft that Motorola has a list of patents that's
19 identified in the annex to the October 21 letter that may be
20 or become essential patents, but regardless of essentiality
21 Motorola is willing to include these patents in the license
22 to avoid any question of essentiality?

23 A. I took it to mean that they believed those were
24 essential and that they would be included in the licensing
25 package because they believed they would be essential.

Highly Confidential - Attorneys' Eyes Only

Page 62

1 HORACIO E. GUTIERREZ

2 Q. Mr. Gutierrez, you've been handed a document that
3 was previously marked as Heiner Exhibit 10. For the record,
4 the document bears Production Nos. MOTM_ITC 0064439 through
5 462.

6 Please take a moment to review this document and
7 tell me whether you recognize it.

8 A. (Witness peruses document.)

9 I do.

10 Q. What is Exhibit 10?

11 A. It's a letter from Mr. Kirk Daily addressed to me
12 dated October 29, 2010, in which Motorola makes, once again,
13 an offer to license a portfolio of patents that in their
14 estimation are relevant to the H.264 standard and for which
15 they make a royalty demand of an additional two and a
16 quarter percent per unit, subject to a grant-back license
17 from Microsoft.

18 Q. Did you personally receive the October 29, 2010
19 letter?

20 A. I did.

21 Q. Do you understand that you have been designated to
22 testify on Microsoft's behalf today with respect to
23 Microsoft's actions and response to receiving the
24 October 29th, 2010 letter?

25 A. I do.

2 Q. Do you feel prepared to testify in that capacity?

3 A. Yes.

[illegible]

22 Q. Prior to receiving the October 29, 2010 letter,
23 had Microsoft ever applied for a license to Motorola's H.264
24 patent portfolio?

25 A. I'm not aware of that having happened, no.

Q. In response to receiving the October 29, 2010 letter, did Microsoft apply for a license to Motorola's H.264 patent portfolio?

[illegible]

Highly Confidential - Attorneys' Eyes Only

Page 65

1

HORACIO E. GUTIERREZ

2

●

●

●

●

●

●

●

●

11

Q. In response to receiving the October 29, 2010

12

letter, did Microsoft perform a financial valuation of

13

Motorola's H.264 patent portfolio?

14

MR. PRITIKIN: We're getting into the same subject

15

we did before. You should not reveal any communications

16

that you had with counsel. If you can't answer the question

17

without getting into discussions with counsel, then I would

18

instruct you not to answer.

19

THE WITNESS: Would you repeat the question? I'm

20

sorry.

21

BY MR. SCHOENHARD:

22

Q. In response to receiving the October 29, 2010

23

letter, did Microsoft perform a financial valuation of

24

Motorola's H.264 patent portfolio?

25

A. I'm not aware of that.

Highly Confidential - Attorneys' Eyes Only

Page 66

1 HORACIO E. GUTIERREZ

2 Q. In response to receiving the October 29, 2010
3 letter, did Microsoft perform an analysis of the
4 essentiality of any of the patents identified in the annex
5 to the October 29 letter?

6 MR. PRITIKIN: In answering the question, you
7 should not testify about matters that may or may not have
8 been performed by counsel. You can answer the question with
9 respect to what you personally did.

10 THE WITNESS: Okay. I did not personally perform
11 that analysis.

12 MR. PRITIKIN: Okay.

13 BY MR. SCHOENHARD:

14 Q. In response to receiving the October 29th, 2010
15 letter, did Microsoft perform an analysis of the
16 essentiality of the patents identified in the annex to the
17 October 29 letter?

18 MR. PRITIKIN: The same instruction. I'm going to
19 object to that to the extent that it encompasses work that
20 was done by lawyers. Again, you can testify about what you
21 did personally. You should not testify about what counsel
22 did in connection with the litigation.

23 THE WITNESS: So I already testified personally on
24 the issue, and I don't believe I can go further without
25 answering into attorney-work product.

Highly Confidential - Attorneys' Eyes Only

Page 67

1 HORACIO E. GUTIERREZ

2 MR. PRITIKIN: Then you should not do so.

3 MR. SCHOENHARD: Just to try and speed things up a
4 bit, Mr. Pritikin, it would be helpful if you try to limit
5 your objection to the basis for it and a brief instruction
6 to the witness.

7 If the two of you need to confer off the record to
8 determine whether and to what extent we are approaching into
9 privileged matter, I'm always welcome, of course, to go off
10 the record if need be. But it would be helpful if we could
11 try to get a briefer instruction so that we can keep moving
12 forward.

13 MR. PRITIKIN: It's pretty hard to do it when
14 you're getting into privileged subject matter, but we'll
15 take it question by question.

16 BY MR. SCHOENHARD:

17 Q. In response to receiving the October 29, 2010
18 letter, did Microsoft investigate whether Motorola had
19 previously offered a 2.25 percent royalty rate to other
20 parties?

21 MR. PRITIKIN: Again, the same instruction,
22 Mr. Gutierrez. You should not testify about any work that
23 was done by counsel in connection with the litigation or the
24 anticipated litigation. You can testify as to what you
25 personally did or did not do.

Highly Confidential - Attorneys' Eyes Only

Page 68

1 HORACIO E. GUTIERREZ

2 THE WITNESS: I did not personally conduct such an
3 investigation.

4 BY MR. SCHOENHARD:

5 Q. Can you answer with respect to whether Microsoft
6 conducted such an investigation?

7 MR. PRITIKIN: Same instruction.

8 THE WITNESS: Not without getting into privilege
9 issues.

10 BY MR. SCHOENHARD:

11 Q. Did Microsoft investigate which of its products
12 would be impacted by the proposed license in the October 29
13 letter?

14 MR. PRITIKIN: I'm going to instruct the witness
15 not to answer the question on grounds of attorney-client
16 work-product privilege.

17 BY MR. SCHOENHARD:

18 Q. In response to receiving the October 29, 2010
19 letter, did Microsoft investigate what portion of its patent
20 portfolio would be subject to proposed grant-back?

21 MR. PRITIKIN: Same instruction.

22 THE WITNESS: Unfortunately, this is a field in
23 which, you know, my knowledge all derives from discussions
24 with in-house and outside counsel on a topic that I believe
25 would be the subject of attorney work-product privilege.

Highly Confidential - Attorneys' Eyes Only

Page 69

1 HORACIO E. GUTIERREZ

2 MR. PRITIKIN: You should not testify about that.

3 MR. PALUMBO: Let's take a quick break.

4 MR. SCHOENHARD: Let's go ahead and take a quick
5 break.

6 THE VIDEOGRAPHER: The time is 11:16.

7 We are going off the record.

8 Here marks the end of Tape No. 1 in the video
9 deposition of Horacio Gutierrez.

10 (Pause in the proceedings.)

11 THE VIDEOGRAPHER: The time is 11:28.

12 We are going back on the record.

13 Here marks the beginning of Tape No. 2 in the video
14 deposition of Horacio Gutierrez.

15 Proceed.

16 BY MR. SCHOENHARD:

17 Q. Earlier, if I heard you correctly, you referred to
18 the 2.25 percent royalty rate offered in the October 29,
19 2010 letter as an additional 2.25 percent.

20 What did you mean by "additional 2.25 percent"?

21 A. I meant that -- sorry. I meant that I understood
22 the letter to state that that would be a net royalty rate
23 that we would pay to Motorola on top of a cross-licensing of
24 the -- in that case in our conversation really related to
25 the 802.11 portfolio.

Highly Confidential - Attorneys' Eyes Only

Page 70

1 HORACIO E. GUTIERREZ

2 Q. It was your understanding, then, upon reading the
3 October 29, 2010 letter that Motorola would stack the
4 2.25 percent royalties?

5 A. I think -- when you talk about stacking, I think
6 you may -- are you referring to the stacking of the two and
7 a quarter percent offer on H.264 on top of the 802.11 two
8 and a quarter percent?

9 Q. Is that what you were understanding the -- was
10 that your understanding?

11 A. Yes. I think when -- the reading of the letter
12 would indicate that those royalties were independent and
13 that they read on the -- on each of the fields of
14 technology.

15 But whether they were or not, even one of those
16 2.25 percent royalty rates calculated on the finished
17 products on which our components are installed would have
18 been an excessive amount of money. So the stacking of the
19 royalties, you know, would have made a horrible economic
20 deal unfathomably bad.

21 Q. Did Microsoft ever inquire of Motorola whether
22 Motorola intended for the 2.25 percent royalty offer in the
23 October 29 letter to be an additional royalty on top of the
24 2.25 percent offered in the 802.11 letter?

25 A. I actually believe that that question was asked in

Highly Confidential - Attorneys' Eyes Only

Page 71

1 HORACIO E. GUTIERREZ

2 open court in one of the proceedings between the two
3 companies, by outside counsel.

4 Q. In response to receiving the October 29, 2010
5 letter, did Microsoft inquire of Motorola whether the
6 2.25 percent royalty offered in the October 29 letter was
7 contemplated as being in addition to the 2.25 percent
8 royalty offered in the October 21 letter?

9 A. I'm having trouble understanding how that question
10 is different from the previous one that I already answered.

11 Q. Prior to filing the present lawsuit relating to
12 RAND issues, did Microsoft inquire of Motorola whether
13 Motorola intended for the 2.25 percent royalty offer in the
14 October 29 letter to be additional to the 2.25 percent
15 royalty offered in the October 21 letter?

16 A. I don't believe so.

17 Q. Prior to filing the present RAND related lawsuit,
18 did Microsoft inquire of Motorola what royalty rate Motorola
19 might expect for any subset of the patents identified in the
20 annex to the October 29, 2010 letter?

21 A. You know, I think our discussion relating to the
22 802.11 situation applies here too. I think the offer, we
23 read it on its face to be an offer of a license on the
24 patent portfolio of Motorola reading on the H.264 standard.
25 And it was very hard, and it's still very hard, to envision

Highly Confidential - Attorneys' Eyes Only

Page 72

HORACIO E. GUTIERREZ

1
2 a situation where having implemented a compliant version of
3 the standard, one could license only a portion of the
4 patents that are believed to be essential on the standard,
5 because that would really not solve the legal risk. So
6 that -- you know, a partial licensing was not really a topic
7 that was viewed as relevant at the time.

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 Q. Upon receiving the October 29, 2010 letter, did
23 Microsoft understand that one or more of the patents in the
24 annex attached to the October 29 letter may not in fact be
25 essential to the practice of the H.264 standard?

Highly Confidential - Attorneys' Eyes Only

Page 73

1 HORACIO E. GUTIERREZ

2 A. Yeah. Motorola did not make in this letter, like
3 they did in the previous letter, an open claim of
4 essentiality. But what they did say is that they would
5 still expect a two and a quarter percent royalty calculated
6 on the basis of a finished product that, you know,
7 implemented the standard.

8 So I don't think it was really -- it is really as
9 important, you know, what the language is on essentiality
10 here, because they're basically saying they have a group of
11 patents that cover the subject matter of H.264. That's the
12 language that they chose to use in this particular version
13 and that they expect that we would accept a two and a
14 quarter percent per unit royalty for a license under that
15 portfolio that they believe covered the subject matter of
16 H.264.

17 Q. Upon receipt of the October 29, 2010 letter, did
18 Microsoft understand that only a subset of the patents
19 identified in the annex to the October 29 letter was in fact
20 H.264 standard essential?

21 A. No. I don't think that we would say that.

22 Q. Did Microsoft investigate whether only a subset of
23 the patents listed in the annex to the October 29, 2010
24 letter was in fact H.264 standard essential?

25 MR. PRITIKIN: Now, you shouldn't testify about any

Highly Confidential - Attorneys' Eyes Only

Page 74

1 HORACIO E. GUTIERREZ

2 work that was done by counsel. So if you can answer it
3 without getting into that, that's fine. But if you can't
4 answer the question without disclosing the work product or
5 the privileged communications, you should not do so.

6 THE WITNESS: I can't answer it without disclosing
7 work product.

8 MR. PRITIKIN: All right.

9 BY MR. SCHOENHARD:

10 Q. You can set aside Exhibit 10 for now. I think
11 we'll move into a portion of your deposition that's
12 principally in your personal capacity. We may return to
13 your corporate role at a later time after I've had a chance
14 to review notes over lunch. But in the interest of
15 efficiency, let's move on now to your role as a personal
16 deponent today.

17 (Ending of 30 (b)(6) questioning, beginning
18 personal questioning.)

19 By MR. SCHOENHARD:

20 Q. Mr. Gutierrez, you've been handed a document that
21 was previously marked as Heiner Exhibit 14. For the record,
22 the document bears Production Nos. MOTM_WASH1823_0394190
23 through 203.

24 Please take a moment to review this document and
25 tell me whether you recognize it.

Highly Confidential - Attorneys' Eyes Only

Page 75

1 HORACIO E. GUTIERREZ

2 A. (Witness peruses document.)

3 I have seen documents like this at Microsoft. I
4 should caution that there is a large number of versions of
5 these documents as well as versions not only in terms of
6 updates of the agreements but also in terms of the range of
7 technology that it provides, and they may have variations
8 between another.

9 But this appears to be a draft or a template of a
10 Microsoft covenant agreement for -- covering Microsoft
11 patents implemented in the Microsoft Exchange Outlook
12 product or set of products.

13 Q. Do you know who is responsible for the contents of
14 this license template?

15 A. At the time when this agreement appears to have
16 been created -- so the ownership has changed relatively
17 recently. I think the ownership of this program was in
18 Mr. Heiner's group until recently. I believe we had an
19 attorney move from that group into our group, and it is
20 possible that some aspects of the management of the program
21 is now housed in Mr. Matt Penarczyk's organization, in my
22 group.

23 Q. You used the words "this program." What do you
24 mean by "this program"?

25 A. This appears to be a document relating to a

Highly Confidential - Attorneys' Eyes Only

Page 76

1 HORACIO E. GUTIERREZ

2 license that we provide in the context of the Microsoft
3 interoperability program based on the notation at the bottom
4 of the page that relates to MIP, M-I-P. So I take that to
5 mean this is one of the licenses that we provide or at some
6 point provided in the context of the Microsoft
7 interoperability program.

8 Q. What is the Microsoft interoperability program?

9 A. It's a voluntary licensing program created by
10 Microsoft in which we offer for license Microsoft patents
11 that read on certain interoperability technology between
12 Microsoft's high-volume program, that is the most successful
13 widely adopted Microsoft programs, and third-party products.

14 It was a program created in order to promote
15 interoperability, and it's a program that goes beyond what
16 was required of Microsoft in the context of some regulatory
17 consent decrees and undertakings, both in the US and in
18 Europe.

19 Q. As part of the Microsoft interoperability program,
20 Microsoft has committed to license certain of its patents on
21 reasonable and nondiscriminatory terms, correct?

22 A. That's correct.

23 Q. Do you understand the license template that's been
24 marked as Heiner Exhibit 14 to reflect what Microsoft
25 believes to be reasonable and nondiscriminatory terms for

Highly Confidential - Attorneys' Eyes Only

Page 77

1 HORACIO E. GUTIERREZ

2 the license that would be conveyed by this document?

3 A. Yes. At least at the point when this template was
4 created, that was the view; although I should say that that
5 is a dynamic determination that over time royalty rates get
6 adjusted to take account of the actual experience that one,
7 you know, has learned and the evolution of the technology.

8 Q. At the bottom of the document that's been marked
9 as Heiner Exhibit 14, do you see reference to posted and
10 updated Exhibit A, 18 November 2011?

11 A. I see that.

12 Q. Does that indicate to you that Heiner Exhibit 14
13 is a recent version of this license template?

14 A. I really don't know what that means. I don't know
15 what this is an exhibit to, and I'm not -- it's not clear to
16 me whether in fact this was in effect or remains in effect
17 at this point, but that would seem to indicate that at least
18 this document, whatever it is, was a version that someone
19 thought was updated as of November 2011.

20 Q. If you wanted to determine what the most recent
21 version of this document is, who would you ask?

22 A. Probably this person, this attorney in Matt
23 Penarczyk's team that came from Mr. Heiner's team who is the
24 person with the most up to date -- most -- the closest
25 connection with these agreements and its subsequent

Highly Confidential - Attorneys' Eyes Only

Page 78

1 HORACIO E. GUTIERREZ

2 revisions.

3 Q. Do you recall that individual's name?

4 A. His name is Stewart -- oh, gosh, I'm blanking.
5 This is so embarrassing. The last name will come back to
6 me.

7 Q. Please direct your attention to Page 4 of the
8 document that's been marked as Heiner Exhibit 14.

9 A. Yes.

10 Q. And in particular to Section 3.2 of "Royalties."
11 Do you see that?

12 A. Yes.

13 Q. Do you see within Section 3.2 a table identifying
14 product types, royalty rates, and minimum royalties?

15 A. Yes.

16 Q. The royalty rates identified for the template
17 license Exhibit 14 are all consistently 1 percent, correct?

18 A. In this version of the document, yeah.

19 Q. And that 1 percent is also subject to minimum
20 royalties, depending on the type of product, correct?

21 A. That's correct.

22 Q. And that 1 percent royalty may include, for
23 example -- there's a product type "device, products that
24 consistent of combinations of hardware and software intended
25 for use" [inaudible] --

Highly Confidential - Attorneys' Eyes Only

Page 79

1 HORACIO E. GUTIERREZ

2 THE COURT REPORTER: I'm sorry. Can you speak a
3 little slower?

4 MR. SCHOENHARD: I apologize.

5 BY MR. SCHOENHARD:

6 Q. One of the product types identified is "device,
7 products that consist of combinations of hardware and
8 software intended for use by a single user." Correct?

9 A. That's correct.

10 But there is a very stark difference between this
11 royalty approach and the base that was proposed in
12 Motorola's letter. The 1 percent in the case of this
13 agreement does not apply to a finished product to which a
14 licensee's component is added, which is the Motorola
15 approach.

16 This agreement uses as the base the product that
17 the licensee sells. So if the licensee sells a finished
18 device, then the 1 percent is applied on the cost of the --
19 on the selling price of the device the licensee sells. If
20 the licensee sells software that then becomes incorporated
21 in a high-end server or laptop, then the 1 percent is not
22 attached to the price of the hardware product, it is only
23 attached to the price of the software component the licensee
24 sells.

25 And that's precisely why we needed a minimum

Highly Confidential - Attorneys' Eyes Only

Page 80

1 HORACIO E. GUTIERREZ

2 royalty here, because sometimes software products are
3 offered for free and therefore the base would be zero, even
4 though they would be installed in a server or a mainframe
5 that could be worth tens or hundreds of thousands of
6 dollars. So that's why the minimum is there.

7 But you know, there are at least two very
8 significant differences between this approach and the
9 Motorola one. One is, the rate is less than half than the
10 Motorola rate. Number two, it covers all patents of
11 Microsoft, all of the 70,000 patents and pending
12 applications of Microsoft around the world as opposed to
13 just a subset of the patents that are attached to the
14 exhibit.

15 And number three, and very significantly, the base
16 upon which the 1 percent is applied is not a third party's
17 product but the very product that the licensee ships.

18 So I think if anything, this agreement demonstrates
19 what a reasonable approach to royalty could or should be in
20 contrast to the Motorola approach.

21 Q. Now if you would return your attention to Exhibit
22 Heiner 9 (Exhibit 9), the 802.11 letter, the October 21st
23 letter.

24 I believe earlier you agreed that you weren't
25 aware of any third-party products that would ultimately be

Highly Confidential - Attorneys' Eyes Only

Page 81

1 HORACIO E. GUTIERREZ

2 implicated by the 2.25 percent royalty rate there.

3 Do I remember correct?

4 A. No, I don't. I'm not sure what you're referring
5 to.

6 Q. Are you aware of any third-party downstream
7 products that would be implicated by the 2.25 percent
8 royalty rate proposed in the October 21 letter?

9 A. Well, the letter refers to any 802.11 compliant
10 product, and then it says that as per Motorola standard
11 terms, the royalty is calculated based on the price of the
12 end product and not on component software.

13 Now, we are primarily a component software
14 supplier, and the end products with respect to our component
15 software, such as the Windows operating system or the
16 Microsoft Office productivity suite, the end product is the
17 hardware on which -- you know, the actual hardware machine,
18 the computer or the server on which it is installed.

19 So you know, the only reasonable reading of this is
20 that the royalty is applied to the base of the finished
21 product in which our component software is incorporated.
22 That's what "component software" means. I believe that's
23 the intent of the last sentence of the first paragraph.

24 Q. Does Microsoft provide any 802.11 component
25 software?

Highly Confidential - Attorneys' Eyes Only

Page 82

1 HORACIO E. GUTIERREZ

2 A. I don't believe I can answer that question without
3 reference to attorney work-product communications.

4 MR. PRITIKIN: Then you shouldn't do so.

5 BY MR. SCHOENHARD:

6 Q. Do you personally know whether Microsoft sells any
7 802.11 compliant component software?

8 MR. PRITIKIN: And again, if you would need to rely
9 on conversations you had with counsel to answer the
10 question, then I would instruct you not to answer it.

11 THE WITNESS: I can't answer it.

12 MR. SCHOENHARD: Mr. Pritkin, with respect, I fail
13 to see how knowing whether Microsoft sells certain products
14 would reflect attorney advice.

15 Could you perhaps fill me in.

16 MR. PRITIKIN: Yeah. You've asked about whether or
17 not it's 802.11 compliant, and that -- I mean, it's up to
18 the witness. But if it implicates some legal analysis as to
19 whether or not it's 802.11 compliant and he -- his knowledge
20 is based only on what he learned from the lawyers, then he
21 can't answer the question.

22 THE WITNESS: Can I just make a point? You know,
23 you obviously can advise me otherwise, but I believe the
24 question you're answering me -- you're asking me would
25 require an answer that would constitute an admission of

Highly Confidential - Attorneys' Eyes Only

Page 83

1 HORACIO E. GUTIERREZ

2 infringement of Motorola patents.

3 BY MR. SCHOENHARD:

4 Q. Do you know whether Microsoft sells any component
5 software that it markets as being 802.11 compliant?

6 A. I'm not aware of -- you know, we sell hundreds of
7 products and make tons of marketing claims. I really
8 can't -- I'm not aware of all of those claims. I couldn't
9 answer specifically.

10 But if I may, I'd just go back to the third
11 sentence of that first paragraph of Exhibit 9. Motorola
12 specifically uses the example of Windows Mobile software as
13 not being the basis upon which the royalty is calculated.
14 So it's basically saying the operating system we supply is
15 component software. So what they're saying is that the
16 price of our software is not the basis for calculation. It
17 would be the price of the finished phone device on which the
18 operating system is installed.

19 So I believe it's pretty clear what the intent of
20 the letter is on the face of those statements.

21

22 [REDACTED]

23 BY MR. SCHOENHARD:

24 Q. Mr. Gutierrez, you have been handed a document
25 that has been marked as Gutierrez Exhibit 1. For the

Highly Confidential - Attorneys' Eyes Only

Page 85

1

HORACIO E. GUTIERREZ

2

•

•

•

•

•

•

•

•

•

•

•

•

•

•

•

•

•

•

•

•

•

•

•

Highly Confidential - Attorneys' Eyes Only

Page 86

1

HORACIO E. GUTIERREZ

2





1

1

1

1

1

1

1

1

1

Highly Confidential - Attorneys' Eyes Only

Page 87

1

HORACIO E. GUTIERREZ

2

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 88

1

HORACIO E. GUTIERREZ

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

23

24

25

MR. PRITIKIN: I'm going to designate the
transcript as highly confidential under the protective
order.

Highly Confidential - Attorneys' Eyes Only

Page 89

1 HORACIO E. GUTIERREZ

2 MR. SCHOENHARD: Understood.

3 BY MR. SCHOENHARD:

4 Q. Mr. Gutierrez, you have been handed a document
5 that has been marked as Gutierrez Exhibit 2. For the
6 record, it bears Production Nos. MS-MOTO_1823_00002244516
7 through 533.

8 Please take a moment and tell me whether you
9 recognize this document.

10 A. (Witness peruses document.)

11 I do.

12 Q. What is Gutierrez Exhibit 2?

[illegible]

Highly Confidential - Attorneys' Eyes Only

Page 90

1

HORACIO E. GUTIERREZ

2



10

10

1

10

1

1

1

1

Highly Confidential - Attorneys' Eyes Only

Page 91

1

HORACIO E. GUTIERREZ

2

•

•

•

•

•

•

•

•

•

•

•

14

BY MR. SCHOENHARD:

15

Q. Mr. Gutierrez, you've been handed a document that

16

has been marked as Gutierrez Exhibit 3. For the record, it

17

bears Production Nos. MS-MOTO_1823_00002244534 through 551.

18

Please take moment to review this document and

19

tell me whether you recognize it.

20

A. I do.

21

Q. What is Gutierrez Exhibit 3?

22

•

•

•

Highly Confidential - Attorneys' Eyes Only

Page 92

1

HORACIO E. GUTIERREZ

2

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 93

1

HORACIO E. GUTIERREZ

2

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

•

[REDACTED]

•

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

•

[REDACTED]

•

[REDACTED]

•

•

[REDACTED]

•

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 94

1

HORACIO E. GUTIERREZ

2

●

●

●

●

●

●

●

●

●

●

●

●

●

●

17

MR. SCHOENHARD: Rather than move on to the next

18

exhibit, I note that we have now hit 12:15. I think now

19

would be a good time for a break.

20

MR. PRITIKIN: Sure. That would be fine.

21

THE VIDEOGRAPHER: The time is 12:13.

22

We are going off the record.

23

(Pause in the proceedings for lunch.)

24

THE VIDEOGRAPHER: The time is 1:02 p.m.

25

We are going back on the record.

Highly Confidential - Attorneys' Eyes Only

Page 95

1

HORACIO E. GUTIERREZ

2

Proceed.

3

4

5

BY MR. SCHOENHARD:

6

7

8

Q. Mr. Gutierrez, you've been handed a document that has been marked as Gutierrez Exhibit 4. For the record, it bears Production Nos. MS-MOTO_1823_00002244347 through 358.

9

10

Please take a moment to review this document and tell me whether you recognize it.

11

A. (Witness peruses document.)

12

I do.

13

Q. What is this document?

14

15

16

17

18

19

20

21

22

23

24

25

Highly Confidential - Attorneys' Eyes Only

Page 96

1

HORACIO E. GUTIERREZ

2



Highly Confidential - Attorneys' Eyes Only

Page 97

1

HORACIO E. GUTIERREZ

2

3

4

5

6

7

BY MR. SCHOENHARD:

8

9

10

Q. Mr. Gutierrez, you've been handed a document that has been marked as Gutierrez Exhibit 5. For the record, it bears Production Nos. MS-MOTO_1823_00005195128 through 152.

11

12

Please take a moment to review this document and tell me whether you recognize it.

13

14

15

A. (Witness peruses document.)

I don't believe I've ever seen this document before.

16

17

18

19

20

21

22

23

24

25

Highly Confidential - Attorneys' Eyes Only

Page 98

1

HORACIO E. GUTIERREZ

2

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

[REDACTED]

•

[REDACTED]

•

[REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 99

1

HORACIO E. GUTIERREZ

2

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

•

[REDACTED]

•

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

•

[REDACTED]

2

[illegible]

Highly Confidential - Attorneys' Eyes Only

Page 101

1

HORACIO E. GUTIERREZ

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17 BY MR. SCHOENHARD:

18 Q. Mr. Gutierrez, you've been handed a document that
19 has been marked as Gutierrez Exhibit 6 bearing Production
20 Nos. MS-MOTO_1823_00002247100 through 115.

21 Please take a moment to review this document and
22 tell me whether you recognize it.

23 A. (Witness peruses document.)

24 I don't believe I've ever seen this document
25 before.

2

1

1

1

25 My predecessor Marshall Phelps actually stayed in

Highly Confidential - Attorneys' Eyes Only

Page 104

1 HORACIO E. GUTIERREZ

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 Q. Mr. Gutierrez, I've handed you two documents
15 previously marked as Heiner Exhibits 16 (Exhibit 16) and 17
16 (Exhibit 17). Please take a moment to review these and tell
17 me whether you recognize them.

18 And for the record, Heiner Exhibit 16 is marked
19 with Production Nos. MOTM_WASH1823_0394299 through 325. And
20 Heiner Exhibit 17 bears Production Nos.
21 MOTM_WASH1823_0394402 through 413.

22 A. (Witness peruses document.)

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 105

1

HORACIO E. GUTIERREZ

2

3

4

5

6

7

8

9

10

11

12

13

14

Q.

15

16

17

18

19

20

Q.

21

22

23

24

25

A.

That's correct.

Highly Confidential - Attorneys' Eyes Only

Page 106

1 HORACIO E. GUTIERREZ

2 Q. And you have been involved in that effort,
3 correct?

4 A. Yes.

5 Q. Do you understand that Microsoft previously had
6 taken the position that injunctive relief was appropriate in
7 the context of standard-essential patent assertions?

8 A. I'd have to say that as a matter of policy of the
9 company, the position that injunctive relief is
10 inappropriate in the case of standard-essentials IP is
11 clearly a public position we've taken, and we've actually
12 made public statements and posted to our website that
13 policy.

14 The policy -- the position that we took before, you
15 know, I think it depends on -- you know, different people in
16 the company might have had different opinions of the topic,
17 but I am aware of the fact that the standard team in certain
18 contexts took positions that indicated that injunctive
19 relief might be appropriate in certain circumstances.

20 That position, however, now has changed as a result
21 of a number of developments in the legal system and in the
22 market, and some of them affecting us, and particularly in
23 the context of the current litigation between Motorola and
24 Microsoft, that has really illustrated to Microsoft the
25 pitfalls of enabling injunctive relief in the

Highly Confidential - Attorneys' Eyes Only

Page 107

1 HORACIO E. GUTIERREZ

2 standard-essential patent setting.

3 Q. As part of these efforts, you have communicated
4 with your counterparts at other corporations, including
5 Apple, correct?6 A. Yes, Apple among a relatively -- a sizable number
7 of other companies.8 Q. Why have you been communicating with other
9 companies as you develop this position?10 A. Well, first of all to try to gauge their position
11 on the topic and try to determine if there is an industry-
12 wide position in the technology sector or in the computer
13 technology area on the issue and try to gauge their
14 sentiments on the issue. And also in part to try to
15 determine that if -- if there is a common position on those,
16 whether those companies can work together with Microsoft in
17 advocating that position.18 Q. I'd like to turn your attention back to the
19 October 21 and 29, 2010 letters marked as Heiner Exhibits 9
20 (Exhibit 9) and 10 (Exhibit 10).21 MR. SCHOENHARD: Mr. Pritikin, I believe we'll now
22 be heading back into a line of questioning for which
23 Mr. Gutierrez has been designated as a corporate deponent.

24 MR. PRITIKIN: Okay.

25 (Ending of personal questioning, resuming 30 (b)(6))

Highly Confidential - Attorneys' Eyes Only

Page 108

1 HORACIO E. GUTIERREZ

2 questioning.)

3 BY MR. SCHOENHARD:

4 Q. Redirecting your attention, Mr. Gutierrez, to
5 Heiner Exhibit 10, the October 29, 2010 letter.

6 A. Yes.

7 Q. In response to receipt of the October 29, 2010
8 letter, Microsoft ultimately reached a determination that in
9 its view, the offer of 2.25 percent per unit royalty was
10 unreasonable, correct?11 A. We reached the determination that that royalty,
12 given the nature and scope of the license being offered and
13 the base upon which it was calculated, was unreasonable,
14 yes.15 Q. Do you know when Microsoft reached that
16 determination?17 A. I believe that -- you know, that was a conclusion
18 that we reached soon after receiving the letter, because we
19 felt that the terms of the letter were blatantly outside of
20 the scope of what could be considered reasonable.21 While reasonable people may disagree on what RAND
22 means, we felt this royalty demand fell way outside of any
23 rational room for disagreement among reasonable people.24 Q. What did Microsoft believe would have been in the
25 realm of rational disagreement between people?

Highly Confidential - Attorneys' Eyes Only

Page 109

HORACIO E. GUTIERREZ

1
2 A. Well, a royalty that was based on the contribution
3 that Motorola had made to the standard and that took into
4 account the ex-ante value of that contribution as opposed to
5 essentially becoming a tax through innovation that Microsoft
6 and hardware vendors and many other companies had made to
7 the devices on which they were attempting to impose a
8 license; so something that took into account the actual
9 value -- intrinsic value of their inventive contribution to
10 the standard at the time when they made it.

11 And, you know, you can -- you can know generally
12 what the ballpark is by looking at the patent pool rates and
13 by looking at other similar ones, and this was so many times
14 larger and pegged to a base that had no relationship with
15 Motorola's contribution that it was, on its face,
16 unreasonable and discriminatory.

17 Q. What value did Microsoft believe Motorola's
18 contribution did represent?

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 But you really didn't have to determine what the

Highly Confidential - Attorneys' Eyes Only

Page 110

1

HORACIO E. GUTIERREZ

2

actual rate might be to know that the royalty demand was
completely out of touch with, you know, anywhere that would
be considered reasonable.

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Highly Confidential - Attorneys' Eyes Only

Page 111

1

HORACIO E. GUTIERREZ

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

Q. If Motorola's October 29 letter had offered a

20

2.25 percent per unit royalty to Motorola's entire

21

portfolio, including both standard-essential and

22

nonessential patents, would that have been reasonable and

23

nondiscriminatory?

24

MR. PRITIKIN: And I'm going to object to that as

25

outside the scope of the 30(b)(6) topic. But again, if you

Highly Confidential - Attorneys' Eyes Only

Page 112

1 HORACIO E. GUTIERREZ

2 want to pose it to him in his individual capacity and if he
3 has an answer to the question, he can provide it.

4 THE WITNESS: I mean, you're asking me a
5 hypothetical question and asking me to speculate. First of
6 all, I would try to resist off-the-cuff conclusions.

7 On an issue like that, I would consider that offer.
8 I would first ask the question what would be the base upon
9 which the two and a quarter percent is imposed. Is it
10 really Microsoft's products or is it a third-party's product
11 downstream? Because that would be a significant element to
12 determine the reasonableness of the offer. Your question
13 doesn't indicate what the base is.

14 But I would look into that and then make a
15 determination based on our assessment of, you know, what
16 belief the elements are of a reasonable royalty -- what we
17 believe the elements are of a reasonable royalty.

18 BY MR. SCHOENHARD:

19 Q. In response to receiving the October 29, 2010
20 letter, did Microsoft take into account the extent to which
21 Motorola had experience in outbound licensing of its patents
22 to non end user product suppliers?

23 [REDACTED]
[REDACTED]
[REDACTED]

Highly Confidential - Attorneys' Eyes Only

Page 113

HORACIO E. GUTIERREZ

[REDACTED]

17 Q. In response to receiving the October 29, 2010
18 letter, did Microsoft make any efforts to determine what a
19 RAND offer would have looked like?

20 A. I don't believe I can answer that question without
21 getting into attorney work-product issues.

22 MR. PRITIKIN: Then you should not provide
23 privileged information.

24 MR. SCHOENHARD: Mr. Pritikin, I'd like to briefly
25 express a concern I've had that's come up over the course of

Highly Confidential - Attorneys' Eyes Only

Page 114

1 HORACIO E. GUTIERREZ

2 today in terms of where the boundaries are with respect to
3 attorney-client privilege and work product in this case
4 generally and in particular within the context of this
5 deposition.

6 It appears that Microsoft will not permit
7 Mr. Gutierrez to testify with respect to any determination
8 that Microsoft made as to what terms would have been RAND
9 terms for Motorola's 802.11 and H.264 essential patent
10 portfolios, and further appears to refuse to permit
11 Mr. Gutierrez to testify if such a determination was made,
12 when the determinations were made, and what terms, you know,
13 would ultimately have been RAND.

14 Because we expect that those will ultimately be
15 issues in this case, if Microsoft continues to refuse
16 Mr. Gutierrez to testify on these subjects, I believe it
17 would be appropriate for Motorola to ultimately seek to
18 prevent Microsoft from presenting evidence of what would
19 have been a RAND offer at the time these offers were made.

20 MR. PRITIKIN: We respectfully disagree.

21 MR. SCHOENHARD: Well, do you intend to maintain
22 the privilege objections and the line that's been set out
23 today as to scope of privilege?

24 MR. PRITIKIN: You know, we've taken it question by
25 question. I'm not going to enter into discussions on

Highly Confidential - Attorneys' Eyes Only

Page 115

1 HORACIO E. GUTIERREZ

2 generalities with you. We've taken it question by question.
3 We don't intend to waive privilege, but obviously people can
4 do a lot of work that is subject to the work product
5 privilege and use materials at trial.

6 So if I ask you about the work that your experts
7 have been doing to prepare your case, you're not going to
8 disclose it and your fact witnesses aren't going to disclose
9 it, but you're not going to be barred from having your
10 experts testify at trial or marshalling arguments. But
11 you're not entitled to get at those things with a fact
12 witness.

13 MR. SCHOENHARD: But here I have not been asking
14 about expert preparation in the context of litigation. I've
15 been asking about Microsoft's determination that in its view
16 Motorola's offers were not RAND, and on the basis of that,
17 Microsoft's decision to bring suit.

18 Absent any understanding of what Microsoft actually
19 substantive did to reach that conclusion in addition to what
20 Microsoft might have determined would have been RAND puts us
21 at a dramatic disadvantage when we try to, you know,
22 demonstrate that in fact reasonable efforts were made to
23 enter into good-faith negotiations here.

24 MR. PRITIKIN: Well, we disagree. I don't think
25 there's any point in arguing about this on the record here.

Highly Confidential - Attorneys' Eyes Only

Page 116

1 HORACIO E. GUTIERREZ

2 We've taken it question by question. I think that's the
3 only way one can approach it.

4 He's provided you with a good deal of information
5 today, but in -- he has testified that -- in answer to many
6 of the questions that you've posed that he could not answer
7 the question without disclosing information he had gotten as
8 part of the attorney-client privilege and the work product
9 of the Microsoft lawyers, and you don't have a right to
10 discover that.

11 THE WITNESS: And if I may just add --

12 MR. PRITIKIN: No, no. You shouldn't say anything.

13 THE WITNESS: Okay.

14 BY MR. SCHOENHARD:

15 Q. Mr. Gutierrez, returning your attention just
16 briefly to Heiner Exhibit 10, the October 29 letter, upon
17 receipt of the October 29, 2010 letter, did you do anything
18 before you forwarded the letter to your litigation team?

19 A. I probably opened it and glanced at it.

20 Q. Did you do any substantive analysis before
21 forwarding the letter to your litigation team?

22 A. No, I don't believe I did.

23 Q. And with respect to the October 21, 2010 letter
24 which has been marked as Heiner Exhibit 9, upon receipt of
25 the October 21 letter, did you perform any substantive

Highly Confidential - Attorneys' Eyes Only

Page 117

1 HORACIO E. GUTIERREZ

2 analysis prior to forwarding the letter to your litigation
3 team?

4 A. No.

5 And I wouldn't be the right person to perform that
6 substantive analysis anyway. This would require a level of
7 expertise both on the technical matters and a level of
8 analysis of the patents attached to it that I'm not in a
9 position to do myself, given my background.

10 Q. Who would be the appropriate person?

11 A. That would be the litigation team working with the
12 patent analysis team and working with external consultants
13 and counsel.

14 Q. Before you forwarded the October 21 letter to your
15 litigation team, did you initiate any actions by the patent
16 analysis team?

17 A. It is possible that when I forwarded the letter, I
18 forwarded it both to the litigation team as well as some
19 people in the patent team, including the patent analysis
20 team. But your question is whether I did that before I
21 forwarded it to litigation, and the answer to that would be
22 no.

23 MR. SCHOENHARD: Why don't we take another,
24 ideally, pretty brief break while I review my notes and see
25 if I have anything further for you today.

Highly Confidential - Attorneys' Eyes Only

Page 118

1 HORACIO E. GUTIERREZ

2 THE WITNESS: Thank you.

3 THE VIDEOGRAPHER: The time is 1:45.

4 We are going off the record.

5 (Pause in the proceedings.)

6 THE VIDEOGRAPHER: The time is 1:56.

7 We are going back on the record.

8 Proceed.

9 BY MR. SCHOENHARD:

10 Q. Mr. Gutierrez, I have just a short handful of
11 questions for you, and I think we'll be wrapped up for the
12 day.

13 Earlier I believe you testified that bilateral
14 negotiations are typically needed between parties in order
15 to arrive at what the parties will consider to be reasonable
16 and nondiscriminatory terms for a license.

17 MR. PRITIKIN: Now we're in the individual
18 deposition?

19 MR. SCHOENHARD: I'm comfortable with his response
20 here being in his personal capacity.

21 MR. PRITIKIN: All right.

22 THE WITNESS: Yes. That tends to be a common way
23 of doing it. And of course there are other ways in which,
24 through patent pools or other mass-market type of licensing
25 approaches, one can announce a relatively stable set of

Highly Confidential - Attorneys' Eyes Only

Page 119

1 HORACIO E. GUTIERREZ

2 royalty rates and people can just take them. So that's also
3 one way of arriving at it.

4 But it is not uncommon for parties to engage in
5 bilateral negotiations and establish the rate, particularly
6 when their license is going both ways.

7 BY MR. SCHOENHARD:

8 Q. What is the purpose of the bilateral negotiation?

9 A. Well, outside of the standards world, there can be
10 a number of considerations that would affect the economics
11 of the license. So one purpose of the bilateral negotiation
12 is to really understand, you know, the rights that are
13 flowing both ways and the scope of the license that's being
14 offered.

15 When parties commence these negotiations, you know,
16 they really don't start through a letter like the one
17 Motorola sent us on October 21st or October 29th of 2010.
18 The conversation starts from a much broader perspective, and
19 the parties are exploring opportunities for licensing where
20 the scope is not so well-defined.

21 So there's a process of determining what each party
22 thinks it needs from the other and then the scope of the
23 rights being granted to one another and then the economics
24 that would apply given those considerations.

25 Q. One of the -- one of the types of information that

Highly Confidential - Attorneys' Eyes Only

Page 120

1 HORACIO E. GUTIERREZ

2 the parties will learn through bilateral negotiations will
3 be information related to what an appropriate royalty base
4 would be, correct?

5 A. That's correct.

6 Q. And parties may also learn through negotiation
7 what standard licensing terms the other parties might
8 typically adhere to, correct?

9 A. That's correct.

10 Q. Parties may also learn during bilateral
11 negotiations what their counterparty's cost structures are,
12 correct?

13 A. That's correct.

14 Q. And all of this information, both in the standards
15 context and outside the standards context, is useful in
16 enabling the parties to understand ultimately what the
17 structure would be for a reasonable royalty in that given
18 case, correct?

19 A. That is possible, yeah.

20 Q. In response to receiving the October 21 and
21 October 29, 2010 letters, did Microsoft evaluate the extent
22 to which Motorola would have necessary information in its
23 possession in order to put together the terms for a
24 reasonable and nondiscriminatory license?

25 A. I'm not sure I understand the question. Can you

Highly Confidential - Attorneys' Eyes Only

Page 121

1 HORACIO E. GUTIERREZ

2 maybe rephrase that?

3 Q. Let me back up a couple steps.

4 Do you know what percentage of the sale price of,
5 for example, a Dell computer the Microsoft operating system
6 comprises?

7 A. Not specifically. But if you assume that a laptop
8 is somewhere between 700 and \$1,000 and that the operating
9 system is just one component of that product and that Dell
10 may pay -- I don't know the prices for sure, but I think
11 they may be in the area of, depending on the version,
12 somewhere between 50 and \$80, then they're, you know,
13 probably 10 percent or less of the value of the finished
14 product.

15 Q. Do you know if that information is public?

16 A. I think -- you know, I'm actually -- the exercise
17 that I'm doing is more based on information I learn as a
18 consumer of technology devices and set of information that I
19 acquire just as a private person as opposed to information
20 that I'm privy to as a result of my involvement at
21 Microsoft. And the numbers may not be exact, but I think
22 they're generally in the order of magnitude of those
23 figures.

24 Q. As of October 21 and 29 of 2010, do you know
25 whether Motorola was familiar with the cost structure for

Highly Confidential - Attorneys' Eyes Only

Page 122

1 HORACIO E. GUTIERREZ

2 laptop computers?

3 A. Well, Motorola had been a licensee of the Windows
4 operating system, both on phones and on PCs, and therefore
5 had been a signatory to the Microsoft OEM, original
6 equipment manufacturer, the license agreements. So I think
7 there would be reason to believe that they had some
8 familiarity with it.

9 Q. Do you know whether Microsoft -- do you know
10 whether Motorola did in fact know what percentage of a
11 laptop was comprised of Microsoft software at the time they
12 sent the October 21 and 29, 2010 letters?

13 A. There's no way for me to know what they were
14 thinking, no, or what they knew.

15 Q. In response to receiving the October 21 and
16 October 29, 2010 letters, did Microsoft inform Motorola that
17 Microsoft believed that Motorola was targeting the wrong
18 royalty base?

19 A. I am sure that we've had discussions with Motorola
20 in which we've made that point to them on more than one
21 occasion. If you ask me to pinpoint at what point in time
22 those conversations happened, I really couldn't -- wouldn't
23 be able to.

24 But again, I'm going to refer back to the fact that
25 as a licensee of the Microsoft software until just a couple

Highly Confidential - Attorneys' Eyes Only

Page 123

1 HORACIO E. GUTIERREZ

2 of years before these letters were sent, Motorola had to
3 have had a relatively good understanding of the cost of an
4 operating system platform compared to the cost of their own
5 products, because one of the skills that companies in the
6 hardware business have to develop as a means of surviving is
7 to be able to manage the build of materials, the cost that
8 goes into building a device. And the cost of the operating
9 system relative to the overall device should be something
10 that anybody with some, you know, basic business
11 understanding in the Motorola hardware division ought to be
12 able to know.

13 Q. When you refer to hardware, do you understand
14 Motorola traditionally to be a hardware manufacturer?

15 A. Well, their main products are in the hardware
16 space. Obviously creating those products requires more
17 hardware. It requires everything from the operating system,
18 and Motorola had developed even their own proprietary
19 operating systems at some point and had also tried a variety
20 of other ones, including the Windows operating system as
21 well as the applications that run on it and the full set of
22 features and services that go with it.

23 So they're, you know, one of the most sophisticated
24 device manufacturers, and that gives them, I think, a really
25 good look into both software and hardware elements of the

Highly Confidential - Attorneys' Eyes Only

Page 124

1 HORACIO E. GUTIERREZ

2 devices they manufacture.

3 Q. Traditionally Motorola has sold hardware devices
4 to end consumers, correct?

5 A. I think that's accurate generally.

6 Q. And, you know, traditionally Microsoft is
7 predominantly a software company, correct?

8 A. Predominately in terms of the percentage of the
9 revenue of Microsoft that comes from software, the answer
10 would be yes. But Microsoft has actually made hardware in
11 certain segments for, you know, over a decade.

12 Q. Would you agree that Motorola's competitors
13 traditionally have been other device manufacturers?

14 A. I think it is fair to say that that's the case
15 with respect to the business that is Motorola Mobility's
16 business. Obviously, you know, a year and a half ago or so,
17 Motorola split from Motorola, Inc., and they had other lines
18 of businesses that I think may include services to
19 governments and other things.

20 But if you mean the handset business, which I think
21 is the bulk of the business that is now part of what is
22 called Motorola Mobility, I think they're -- a majority
23 segment of competition for them would come from other
24 hardware devices, manufacturers.

25 Q. Upon receiving the October 21 and 29, 2010

Highly Confidential - Attorneys' Eyes Only

Page 125

1 HORACIO E. GUTIERREZ

2 letters, did Microsoft take into account that Motorola's
3 traditional experience in licensing was predominantly with
4 other device manufacturers?

5 A. I don't -- I don't -- to be honest, I don't think
6 we did.

7 What we did know is that they had had ample
8 experience in licensing standard-essential patents. We knew
9 them to be very active, particularly in the licensing and
10 cross-licensing of cellular wireless IP, CDMA, GSM types of
11 technologies, which really are not implemented exclusively
12 on hardware but are significantly implemented in software,
13 and their expertise in licensing in that area indicated to
14 us that they're a very sophisticated licensor in the
15 standards area.

16 So we read these letters assuming, I think
17 correctly, that they were coming from someone who knew
18 exactly what these terms meant and, because of their
19 familiarity with both the hardware and software space, you
20 know, meant what they said in that letter.

21 Q. At the time you received the October 21 and 29,
22 2010 letters, were you aware of any instance in which
23 Motorola had entered into a license agreement that was not
24 based on the price of the end product?

25 A. I did not know that. I -- I'm afraid to say, I

Highly Confidential - Attorneys' Eyes Only

Page 126

1 HORACIO E. GUTIERREZ

2 still don't know.

3 MR. SCHOENHARD: Mr. Gutierrez, I thank you very
4 much for your time.

5 THE WITNESS: Thank you.

6 MR. PRITIKIN: And I have no questions for the
7 witness.

8 THE VIDEOGRAPHER: This concludes today's
9 proceeding in the video deposition of Horacio Gutierrez, and
10 the time is 2:10 p.m.

11 THE COURT REPORTER: Before we go off the record,
12 would you like to order the transcript of the deposition?
13 Standard order?

14 MR. SCHOENHARD: Yes, please.

15 THE COURT REPORTER: Standard order?

16 MR. PRITIKIN: Yeah, and we're going to reserve the
17 right to review and make corrections.

18 THE COURT REPORTER: Okay.

19 THE VIDEOGRAPHER: Same with the video?

20 MR. SCHOENHARD: Standard order.

21 MR. PRITIKIN: Standard order.

22 (Whereupon, the deposition was concluded at
23 2:10 p.m.)

24 (Signature reserved.)
25

Highly Confidential - Attorneys' Eyes Only

Page 127

1 CERTIFICATE

2
3 I, Tia B. Reidt, do hereby certify that
4 pursuant to the Rules of Civil Procedure, the witness
5 named herein appeared before me at the time and place
6 set forth in the caption herein; that at the said time
7 and place, I reported in stenotype all testimony
8 adduced and other oral proceedings had in the
9 foregoing matter; and that the foregoing transcript
10 pages constitute a full, true and correct record of
11 such testimony adduced and oral proceeding had and
12 of the whole thereof.
13

14 IN WITNESS HEREOF, I have hereunto set my hand
15 this 12th day of April, 2012.
16
17
18
19

20 /S/ Tia B. Reidt
21

22 Commission Expiration: June 3, 2014
23
24
25

Highly Confidential - Attorneys' Eyes Only

Page 128

1 CORRECTION SHEET

2 Deposition of: Horacio Gutierrez Date: 04/04/12

3 Regarding: Microsoft Vs. Motorola

4 Reporter: Tia Reidt

5 _____

6 Please make all corrections, changes or clarifications

7 to your testimony on this sheet, showing page and line

8 number. If there are no changes, write "none" across

9 the page. Sign this sheet on the line provided.

10 Page Line Reason for Change

11	_____	_____	_____
12	_____	_____	_____
13	_____	_____	_____
14	_____	_____	_____
15	_____	_____	_____
16	_____	_____	_____
17	_____	_____	_____
18	_____	_____	_____
19	_____	_____	_____
20	_____	_____	_____
21	_____	_____	_____
22	_____	_____	_____
23	_____	_____	_____

24 Signature _____

25 Horacio Gutierrez

Highly Confidential - Attorneys' Eyes Only

Page 129

DECLARATION

Deposition of: Horacio Gutierrez Date: 04/04/12
Regarding: Microsoft Vs. Motorola

I declare under penalty of perjury the following to
be true:

I have read my deposition and the same is true and
accurate save and except for any corrections as made
by me on the Correction Page herein.

Signed at _____, _____
on the _____ day of _____, 2012.

Horacio Gutierrez